No. 16-1432	
Title:	**Ashley Sveen, et al., Petitioners** **v.** **Kaye Melin**
Docketed:	June 1, 2017
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Numbers:	(16-1172)
Decision Date:	April 3, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Jun 01 2017	Petition for a writ of certiorari filed. (Response due July 3, 2017)
Jun 05 2017	Waiver of right of respondent Kaye Melin to respond filed.
Jul 19 2017	DISTRIBUTED for Conference of September 25, 2017.
Aug 01 2017	Response Requested. (Due August 31, 2017)
Aug 16 2017	Order extending time to file response to petition to and including September 29, 2017.
Sep 29 2017	Brief of respondent Kaye Melin in opposition filed.
Oct 06 2017	Reply of petitioners Ashley Sveen, et al. filed.
Oct 18 2017	DISTRIBUTED for Conference of 11/3/2017.
Oct 23 2017	Rescheduled.
Nov 20 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 08 2017	Petition GRANTED.
Dec 18 2017	Letter from counsel for petitioners regarding case caption filed.

	Main Document
Jan 16 2018	Motion to dispense with printing the joint appendix filed by petitioners Ashley Sveen, et al. **Main Document** **Proof of Service**
Jan 22 2018	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 22 2018	Brief of petitioners Ashley Sveen, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 24 2018	SET FOR ARGUMENT ON Monday, March 19, 2018
Jan 26 2018	Brief amicus curiae of American College of Trust and Estate Counsel filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 07 2018	CIRCULATED
Feb 21 2018	Record requested from the U.S.C.A. 8th Circuit.
Feb 21 2018	Brief of respondent Kaye Melin filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2018	Brief amicus curiae of Professor James W. Ely, Jr. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 28 2018	Brief amici curiae of The Women's Law Project, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Record received from the U.S.C.A. 8th Circuit. (1 Box)
Mar 08 2018	Reply of petitioners Ashley Sveen, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 19 2018	Argued. For petitioners: Adam G. Unikowsky, Washington, D. C. For respondent: Shay Dvoretzky, Washington, D. C.

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RECORD
AND
BRIEFS

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No. 16-1432

IN THE
Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,
Petitioners,

v.

KAYE MELIN AND
METROPOLITAN LIFE INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2002, Minnesota enacted legislation providing, in relevant part, that "the dissolution or annulment of a marriage revokes any revocable ... beneficiary designation ... made by an individual to the individual's former spouse." Minn. Stat. § 524.2-804, subd. 1. Thus, if a person designates a spouse as a life insurance beneficiary and later gets divorced, Minnesota law provides that the beneficiary designation is automatically revoked. At least twenty-eight other states have enacted similar revocation-upon-divorce statutes.

The question presented is:

Does the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment violate the Contracts Clause?

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PETITION FOR WRIT OF CERTIORARI

Ashley Sveen and Antone Sveen petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 1a) is reported at 853 F.3d 410. The decision of the District Court (Pet. App. 9a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on April 3, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause, U.S. Const. art. I, § 10, cl. 1, provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts."

Minnesota Statute § 524.2-804, subd. 1, provides:

> **Revocation upon dissolution.** Except as provided by the express terms of a governing instrument, other than a trust instrument under section 501C.1207, executed prior to the dissolution or annulment of an individual's marriage, a court order, a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment, or a plan document governing a qualified or nonqualified retirement plan, the dissolution or annulment of

a marriage revokes any revocable:

(1) disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument;

(2) provision in a governing instrument conferring a general or nongeneral power of appointment on an individual's former spouse; and

(3) nomination in a governing instrument, nominating an individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian.

INTRODUCTION

In 2002, Minnesota enacted legislation providing, in relevant part, that "the dissolution or annulment of a marriage revokes any revocable ... beneficiary designation ... made by an individual to the individual's former spouse." Minn. Stat. § 524.2-804, subd. 1. Thus, if a person designates a spouse as a life insurance beneficiary and later gets divorced, Minnesota's statute provides that the beneficiary designation is automatically revoked. The theory behind this statute is that people who get divorced typically do not intend to maintain their ex-spouses as their beneficiaries but may forget to change their beneficiary designations. Minnesota's statute ensures that this change occurs automatically. If a divorcing policyholder wants an ex-spouse to remain a beneficiary despite their divorce,

the policyholder must contact the insurer after the divorce to add the ex-spouse back to the policy. At least twenty-eight other states have enacted revocation-upon-divorce statutes similar to Minnesota's. *See infra* at 18.

This case presents an important question of constitutional law on which there is an acknowledged conflict of authority: whether the application of revocation-upon-divorce statutes to contracts signed before the statutes' enactment violates the Contracts Clause. The facts of this case are straightforward and undisputed. Mark Sveen married Respondent Kaye Melin in 1997. In 1998—before Minnesota adopted the relevant revocation-upon-divorce provision in 2002—Mark Sveen designated Respondent as the primary beneficiary of his life insurance policy. The couple later divorced in 2007, and Mark Sveen died in 2011.

Minnesota's revocation-upon-divorce statute—if applied according to its terms—requires that Respondent's status as Mark Sveen's beneficiary be revoked in light of their divorce. And, as a result, the statute requires that the policy proceeds go to Petitioners, Mark Sveen's children from a prior relationship and the contingent beneficiaries named on his policy.

In the decision below, however, the Eighth Circuit refused to apply Minnesota's revocation-upon divorce statute to revoke Respondent's beneficiary status. The sole basis for its decision was its holding that the statute is unconstitutional as applied to insurance policies signed prior to the statute's enactment. Adhering to its prior decision in *Whirlpool Corp. v.*

Ritter, 929 F.2d 1318 (8th Cir. 1991), the court held that applying Minnesota's statute to contracts executed before 2002 violated the Contracts Clause because it had the effect of "disrupt[ing] the policyholder's expectations and right to 'rely on the law governing insurance contracts as it existed when the contracts were made.'" Pet. App. 5a (quoting *Whirlpool*, 929 F.2d at 1323).

This case warrants the Court's review. As the Eighth Circuit acknowledged, there is a conflict of authority on the question presented. The Eighth Circuit's decision aligns with *Parsonese v. Midland National Insurance Co.*, 706 A.2d 814 (Pa. 1998). But it conflicts with *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003), which expressly held that *Whirlpool* was wrongly decided. It also conflicts with two state supreme court decisions that likewise expressly rejected *Whirlpool*'s reasoning. *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002); *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007).

This case is also unusually important. A decision invalidating a state statute on federal constitutional grounds has inherent jurisprudential significance. And that significance is heightened because Minnesota's statute is not unique. At least twenty-eight other states have adopted revocation-upon-divorce statutes that are substantively the same. *Infra* at 18. This case will therefore have ramifications across numerous jurisdictions.

Moreover, Minnesota's statute implements § 2-804 of the Uniform Probate Code. Fourteen other states

have adopted the same provision in nearly identical form. *Infra* at 18. These states include Utah, Colorado, and South Dakota—the states whose revocation-upon-divorce statutes were reviewed in *Stillman*, *DeWitt*, and *Buchholz* and found to be *constitutional* when applied to contracts signed before the statutes' enactment. The resultant conflict is especially troublesome because one of the primary purposes of the Uniform Probate Code—and the reason so many states have adopted its provisions—is to promote the stable and uniform treatment of probate matters across jurisdictions. That goal is thwarted when there is a conflict of authority regarding the circumstances in which a provision of the Code may be applied without running afoul of the federal Constitution. Yet such a conflict now exists: the Eighth Circuit has now held that Minnesota's statute implementing § 2-804 cannot be applied to contracts executed prior to its enactment, while three other courts have reached the opposite conclusion with respect to substantively identical provisions implementing § 2-804 in Utah, Colorado, and South Dakota.

The split in this case is particularly troublesome for a second reason: it includes a split between state and federal courts in the same jurisdiction. As noted above, the South Dakota Supreme Court, which lies within the Eighth Circuit, has expressly rejected *Whirlpool*'s reasoning and has concluded that South Dakota's revocation-upon-divorce statute (which is substantively the same as Minnesota's) *is* constitutional when applied to contracts predating its enactment. As such, the outcome of a life insurance dispute will depend on

whether the dispute is resolved in federal or state court, which will lead to incongruous results and forum-shopping.

This case is also an ideal vehicle to resolve the split. The case turns entirely on the constitutional question presented: whether the application of Minnesota's statute to contracts signed before its enactment violates the Contracts Clause. If such application is unconstitutional, Respondent gets the proceeds; if such application is constitutional, Petitioners get the proceeds.

Finally, the Eighth Circuit's decision warrants review because it is wrong. *Whirlpool* has been roundly criticized. The Joint Editorial Board for the Uniform Probate Code issued a statement characterizing *Whirlpool* as "manifestly wrong," *Stillman*, 343 F.3d at 1322, and *Whirlpool*'s reasoning has been squarely rejected by the Tenth Circuit and the Colorado and South Dakota Supreme Courts. And for good reason. A state statute does not violate the Contracts Clause unless it "operate[s] as a substantial impairment of a contractual relationship." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983) (quotation marks omitted). Revocation-upon-divorce statutes do not meet that standard. The designated beneficiary of a revocable life insurance policy has no constitutionally protected interest because the beneficiary is not a party to the contract and the policyholder can change the beneficiary at will. Moreover, these statutes do not interfere with the *policyholder's* contractual rights because they do not affect the insurer's core obligation, *i.e.*, to pay a policy's

proceeds upon the policyholder's death. Additionally, to the extent there is any impairment of the policyholder's contractual rights, that impairment is minimal: if a policyholder really wants an ex-spouse to remain the beneficiary of a policy, despite their divorce, all the policyholder must do is re-designate the ex-spouse as the beneficiary. Finally, even if such statutes did "operate[] as a substantial impairment of a contractual relationship," they would serve a "significant and legitimate public purpose," *id.*—the purpose of effectuating most policyholders' likely intent.

Because this case presents a significant question of constitutional law on which there is an acknowledged conflict of authority, the Court should grant certiorari.

STATEMENT OF THE CASE

Mark Sveen purchased the life insurance policy at issue in this case in 1997. Pet. App. 2a. He married Respondent Kaye Melin later that year, and, in 1998, named her as the primary beneficiary of his life insurance policy. Pet. App. 2a, 9a. He named his two children from a prior relationship, Petitioners Ashley Sveen and Antone Sveen, as contingent beneficiaries. Pet. App. 9a-10a.

In 2002, while the couple was still married, Minnesota enacted the revocation-upon-divorce statute at issue in this case. In relevant part, the statute provides that "the dissolution or annulment of a marriage revokes any revocable ... disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse

in a governing instrument." Minn. Stat. § 524.2-804, subd. 1. The "[p]rovisions of a governing instrument are given effect as if the former spouse died immediately before the dissolution or annulment." *Id.* § 524.2-804, subd. 2.

In 2007, the couple divorced, and, in 2011, Mark Sveen died. At the time of his death, Respondent was still named as the primary beneficiary of his life insurance policy. Pet. App. 2a-3a. Metropolitan Life, the company that issued his life insurance policy, subsequently commenced this interpleader action in the U.S. District Court for the District of Minnesota for a determination of who should receive the policy proceeds. Pet. App. 3a. Both Petitioners and Respondent filed claims. Pet. App. 3a.

The District Court granted summary judgment to Petitioners. It ruled that Minnesota's revocation-upon-divorce statute revoked Respondent's beneficiary status and that Petitioners were therefore entitled to the policy proceeds. In doing so, the court rejected Respondent's argument that the application of Minnesota's statute to a policy signed prior to its enactment would violate the Contracts Clause. Pet. App. 9a-16a.

On appeal, the Eighth Circuit reversed, holding that the application of Minnesota's revocation-upon-divorce statute to a policy signed before its enactment *would* violate the Contracts Clause. The court followed its previous holding in *Whirlpool*, which held that the application of a substantially similar Oklahoma statute to contracts signed before its enactment ran afoul of the Contracts Clause because it interfered with the

policyholder's contractual rights and expectations regarding beneficiary designations. Pet. App. 4a-5a. The court stated that both the Oklahoma and Minnesota statutes had "the same effect," namely, interfering with policyholders' contractual rights and expectations regarding beneficiary designations. Pet. App. 5a. The Eighth Circuit recognized that the Tenth Circuit had since disagreed with *Whirlpool*, but it found no basis to depart from its earlier decision. Pet. App. 7a. Accordingly, it found that Minnesota Statute § 524.2-804 did not revoke Respondent's beneficiary status. The Eighth Circuit and Justice Alito subsequently denied Petitioners' application for a stay of the mandate.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the Eighth Circuit acknowledged, Pet. App. 7a, there is a conflict of authority on the question presented. The Eighth Circuit's decision is consistent with a decision of the Pennsylvania Supreme Court. But it conflicts with decisions from the Tenth Circuit, the Colorado Supreme Court, and the South Dakota Supreme Court.

In the decision below, the Eighth Circuit followed its earlier ruling in *Whirlpool*, which held that the application of Oklahoma's revocation-upon-divorce statute to a policy signed before its enactment violated the Contracts Clause. In *Whirlpool*, James and Darlene Ritter married in 1972. 929 F.2d at 1319. In 1985, James enrolled in a group life insurance plan and

named Darlene as his beneficiary. *Id.* Two years later, Oklahoma enacted a revocation-upon-divorce statute similar to Minnesota's. The couple subsequently divorced in April 1989, and James promptly remarried. *Id.* at 1320. Months later, he was killed, allegedly at the hands of his ex-wife. *Id.* The group life insurance provider filed an interpleader action to determine the rightful beneficiary of James's policy proceeds. *Id.*

The district court concluded that the Oklahoma statute revoked Darlene's beneficiary status, but the Eighth Circuit reversed. It held that applying the statute to insurance contracts entered into prior to the statute's enactment would violate the Contracts Clause. It first concluded that the statute substantially impaired James's life insurance contract, explaining that "one of the primary purposes of a life insurance contract is to provide for the financial needs of a person (or persons) designated by the insured." *Id.* at 1322. Thus, it continued, "[w]hen the Oklahoma legislature changed the rules for interpreting insurance contracts and applied the new rules to completed transactions," such as James's, the legislature "effected a fundamental and pejorative change in the very essence of those contracts." *Id.*

The court then concluded that the impairment could not be justified as a reasonable means of effectuating an important public purpose. *Id.* at 1322-23. While acknowledging that Oklahoma and other states had adopted revocation-upon-divorce statutes with the understanding that divorcees will often intend to revoke beneficiary designations involving their former spouses but inadvertently fail to do so, the court

observed that it was plausible that such individuals *would* want to maintain benefits for their former spouses and, due to the same inattentiveness, fail to take the necessary steps to re-establish their former spouses as beneficiaries after the enactment of a revocation-upon-divorce statute. *Id.* at 1323. As a result, the court believed it was "inappropriate and unreasonable for the legislature to apply [the statute] to pre-existing contracts." *Id.*

The Eighth Circuit's decision is consistent with the Pennsylvania Supreme Court's decision in *Parsonese v. Midland National Insurance Co.*, 706 A.2d 814 (Pa. 1998). There, Francis Meyers and Patricia Parsonese married in 1991. *Id.* at 815. The following year, Meyers designated Parsonese as the primary beneficiary of an existing life insurance policy and designated his three children from previous marriages as the contingent beneficiaries. *Id.* Later that year, the Pennsylvania legislature adopted a revocation-upon-divorce statute similar to Minnesota's. *Id.* at 815-16. The couple then divorced in September 1993, and Meyers died in 1994. *Id.* at 815. At the time of his death, Meyers had not changed Parsonese's status as the named beneficiary of his life insurance policy.

Like the Eighth Circuit, the Pennsylvania Supreme Court concluded that the application of Pennsylvania's revocation-upon-divorce statute to alter the beneficiary designations in life insurance policies executed prior to the statute's enactment would violate the Contracts Clause. The court stated that such application would substantially impair those contracts, explaining that "[s]election of a beneficiary is the entire point of a life

insurance policy." *Id.* at 818. The court then found that the impairment was unreasonable, noting that there are circumstances in which a divorcee may wish to provide life insurance benefits to a former spouse. *Id.* at 818-19.[1]

The Eighth Circuit's decision conflicts, however, with *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003). The facts of *Stillman* are materially identical to the facts here. In 1965, Dale Bryner purchased two annuities and designated his wife, Marilyn Stillman, as the primary beneficiary of the policies' death benefits. *Id.* at 1312-13. The couple divorced in 1970. *Id.* at 1313. In 1998, the Utah legislature adopted § 2-804 of the Uniform Probate Code, a revocation-upon-divorce statute substantively identical to the Minnesota provision at issue here. Utah Code Ann. § 75-2-804(2). Bryner died a year after the statute was enacted. When he died, Stillman was still listed as the primary beneficiary of his annuities.

Before the Tenth Circuit, Stillman argued that the application of Utah's revocation-upon-divorce statute to revoke her beneficiary status would run afoul of the Contracts Clause. The Tenth Circuit disagreed, holding that the statute in no way interfered with contractual relationships. In doing so, the court

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[1] The Ohio Supreme Court reached the same conclusion as the Eighth Circuit and the Pennsylvania Supreme Court when analyzing Ohio's revocation-upon-divorce statute under the Ohio Constitution's Contracts Clause. *Aetna Life Ins. Co. v. Schilling*, 616 N.E.2d 893, 896 (Ohio 1993).

acknowledged that the Eighth Circuit and the Pennsylvania Supreme Court had held that the application of similar statutes in similar circumstances was unconstitutional, but it found that "[t]he *Whirlpool* line of cases ha[d] been persuasively criticized by other distinguished authorities." 343 F.3d at 1322. In particular, it highlighted the statement that the Joint Editorial Board for the Uniform Probate Code issued declaring *Whirlpool* "manifestly wrong." *Id.* (quoting *Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules As Applied to Pre-Existing Documents*, 17 Am. College Trust & Est. Couns. 184 (1991)[2] [hereinafter JEB Statement]). The court agreed with the Board's assessment that "[a] life insurance policy is a third-party beneficiary contract," and that, "[a]s such, it is a mixture of contract and donative transfer." *Id.* (quoting JEB Statement, *supra*). It further agreed that applying revocation-upon-divorce statutes to pre-existing life insurance policies and annuities does not impair the *contractual* component of those policies; after all, the policy providers still must pay the policy proceeds to whomever is deemed the proper beneficiary. *Id.* Instead, such application affects only the donative transfer component of the policies, which "raises no Contracts Clause issue." *Id.* (quoting JEB Statement, *supra*).

The Eighth Circuit's decision likewise conflicts with

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[2] The Joint Editorial Board's statement was reprinted in an addendum filed in the Eighth Circuit, which is available on PACER. Appellant's Addendum at 9, *Melin v. Sveen*, 853 F.3d 410 (8th Cir. 2017) (No. 16-1172) (docketed Mar. 2, 2016).

In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002). There, in each of the cases consolidated for appeal, a husband had obtained life insurance and named his then spouse as the primary beneficiary of the policy. *Id.* at 853. The couples then divorced. In 1995, the Colorado legislature enacted a revocation-upon-divorce statute implementing Uniform Probate Code § 2-804. *Id.* at 852 (citing Colo. Rev. Stat. 15-11-804(2), and noting that the statute "is based on the Uniform Probate Code (UPC) section 2-804"). When the husbands later died, disputes arose as to the whether the revocation-upon-divorce statute could be constitutionally applied in determining the rightful beneficiaries of the husbands' life insurance policies.

The Colorado Supreme Court ruled that the application of the Colorado statute to policies signed before the statute's enactment did not violate the Contracts Clause. The court recognized that "there is a split of authority on this issue," and expressly rejected *Whirlpool* and *Parsonese*. *Id.* at 860 (stating "we do not agree with those courts that have held these statutes to be unconstitutional as violative of the contract clause," and citing, *inter alia*, *Whirlpool* and *Parsonese*). Instead, the court agreed with the Joint Editorial Board's assessment that life insurance contracts are "a mixture of contract and donative transfer" and that revocation-upon-divorce statutes like Colorado's "address[] the donative aspect of the insurance contract[s]" and do not interfere with the contractual components. *Id.* at 859-60. The court also added that because the statute "merely creates a default rule" and does not bar a policyholder from

"maintaining his former spouse as his designated beneficiary," it does not impair the insured's contractual rights. *Id.* at 860.

Finally, the Eighth Circuit's decision conflicts with *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007). In that case, Linda Buchholz and Harold E. Storsve married in 1966. *Id.* at 109. In 1971, Buchholz named Storsve as the primary beneficiary on her state retirement plan. *Id.* Four years later, the couple divorced, and in 1979, Buchholz remarried. She remained married to her second husband until her death twenty-seven years later. *Id.*

In 1995, several years before Buchholz's death, South Dakota, like Minnesota, Utah, and Colorado, adopted § 2-804 of the Uniform Probate Code. *Id.* at 110 (citing S.D. Codified Laws 29A-2-804(b)). After Buchholz's death, Buchholz's surviving husband asserted he was entitled to the plan proceeds pursuant to the revocation-upon-divorce statute. Storsve filed a competing claim, arguing, as Respondent does here, that the South Dakota statute was unconstitutional as applied to life insurance contracts entered into prior to 1995. *Id.* at 109-10.

The South Dakota Supreme Court held that the application of the revocation-upon-divorce statute to determine the beneficiary of Buchholz's policy did not violate the Contracts Clause.[3] The court expressly

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[3] Although Storsve relied on South Dakota's Contracts Clause, the South Dakota Supreme Court cited both the federal and state Contracts Clause. *Id.* at 113 n.3. It also observed that they are "in substance and effect the same provisions," and that it therefore

rejected the Eighth Circuit's decision in *Whirlpool*, explaining that *Whirlpool* had been "persuasively criticized by both the Joint Editorial Board ... and other court decisions," such as *Stillman* and *DeWitt*. *Id.* at 113. The court agreed with decisions finding that applying revocation-upon-divorce statutes in situations like the one before it does not impair an insured's contractual rights because "the essential elements of the bargained-for exchange remain intact"—the insured pays premiums and, in return, the insurer is "required to pay benefits." *Id.* at 114 (quotation marks omitted; alteration omitted). Moreover, the court agreed with previous decisions holding that because revocation-upon-divorce statutes like South Dakota's establish nothing more than a default rule, they do not substantially impair contractual rights. *Id.* And it further agreed that even if the statutes *did* substantially impair contractual relationships, the impairment would be justified on the grounds that they "serve[] important public purposes, including promoting uniformity among state law treatment of probate and non-probate transfers and implementing a rule of construction that reflects legislative judgment that ex-spouses often intend to change their beneficiaries." *Id.* (quotation marks omitted).

Thus, there is a clear conflict of authority on whether the application of revocation-upon-divorce

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"look[s] to the United States Supreme Court's analysis of the Federal Constitution's Contract Clause for guidance." *Id.* at 113 n.4. Thus, the South Dakota Supreme Court's decision forecloses a federal Contracts Clause challenge to a revocation-upon-divorce statute in South Dakota's state courts.

statutes to policies signed before their enactment violates the Contracts Clause.

II. THIS CASE WARRANTS THIS COURT'S REVIEW.

The Court should grant certiorari to resolve the conflict of authority. There is no need for additional percolation. *Whirlpool* was decided 26 years ago, and courts have debated its merits ever since. As a result, the arguments on both sides of the issue have now been fully aired.

Moreover, this case is as clean a vehicle as this Court will see. Minnesota's statute reflects an implementation of Uniform Probate Code § 2-804; there are no idiosyncrasies in Minnesota's statute that would warrant denying review. Further, there are no material facts in dispute. Mark Sveen expressly designated Petitioners as his contingent beneficiaries. As such, the District Court granted summary judgment to Petitioners. The Eighth Circuit reversed the District Court solely on the ground that the application of Minnesota's statute to a contract signed prior to its enactment is unconstitutional. Thus, this case squarely presents the constitutional question.

Further, several other aspects of this case make it a particularly compelling candidate for this Court's review.

First, the issue in this case is important. It is jurisprudentially significant: It is not every day that a federal court strikes down a duly-enacted state statute under the Contracts Clause. The issue is also practically significant. As noted above, Minnesota took

its revocation-upon-divorce statute from the Uniform Probate Code, a uniform act akin to the Uniform Commercial Code adopted by the National Conference of Commissioners on Uniform State Laws. Fourteen other states have similarly adopted the Uniform Probate Code in relevant part and therefore have revocation-upon-divorce statutes nearly identical to Minnesota's.[4] At least fourteen additional states have substantially similar revocation-upon-divorce statutes.[5] And at least one other state is considering adopting similar legislation.[6] Thus, the Court's ruling will have ramifications in numerous states.

Second, a conflict involving the Uniform Probate Code is especially troubling because the purpose of the Uniform Probate Code is to promote the uniform treatment of probate matters across multiple states. Uniform Probate Code § 1-102 states that one of the

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[4] Alaska Stat. Ann. § 13.12.804; Ariz. Rev. Stat. Ann. § 14-2804; Colo. Rev. Stat. Ann. § 15-11-804; Haw. Rev. Stat. Ann. § 560:2-804; Idaho Code Ann. § 15-2-804; Mass. Gen. Laws Ann. ch. 190B § 2-804; Mich. Comp. Laws Ann. § 700.2807; Mont. Code Ann. § 72-2-814; N.J. Stat. Ann. § 3B:3-14; N.M. Stat. Ann. § 45-2-804; N.D. Cent. Code Ann. § 30.1-10-04; S.C. Code Ann. § 62-2-507; S.D. Codified Laws § 29A-2-804; Utah Code Ann. § 75-2-804.

[5] Ala. Code § 30-4-17; Cal. Prob. Code § 5040; Fla. Stat. Ann. § 732.703; Iowa Code Ann. § 598.20A; Mo. Ann. Stat. § 461.051; Nev. Rev. Stat. Ann. § 111.781; N.Y. Est., Powers and Trusts Law § 5-1.4; Ohio Rev. Code Ann. § 5815.33; Okla. Stat. Ann. tit. 15, § 178; 20 Pa. Stat. and Cons. Stat. Ann. § 6111.2; Tex. Fam. Code Ann. §§ 9.301, 9.302; Va. Code Ann. § 20-111.1; Wash. Rev. Code Ann. § 11.07.010; Wis. Stat. Ann. § 854.15.

[6] *See* An Act Regarding Nonprobate Transfers on Death, H.P. 682, 128th Leg., 1st Sess. (Me. 2017).

"underlying purposes and policies" of the Code is "to make uniform the law among the various jurisdictions." *See also* Minn. Stat. § 524.1-102 (similarly stating that Minnesota's probate code intends "to make uniform the law among the various jurisdictions"). Yet, there is now a square conflict of authority over the constitutionality of a provision of the Uniform Probate Code: the Eighth Circuit invalidated Minnesota's version of Uniform Probate Code § 2-804 as applied to policies that predate its enactment, whereas, as explained above, the versions of Uniform Probate Code § 2-804 enacted in Utah, Colorado, and South Dakota have been upheld against the identical constitutional challenge. Only this Court can resolve that conflict of authority on this issue of federal law.

Third, the conflict is particularly troubling because it involves a conflict between state and federal courts in the same jurisdiction. As noted above, the Supreme Court of South Dakota, which lies within the Eighth Circuit, rejected the Eighth Circuit's decision in *Whirlpool*. As a result, South Dakota's state courts will apply South Dakota's revocation-upon-divorce statute to policies signed before its enactment, but South Dakota's federal courts will not. That scenario results in several undesirable consequences. For instance, the beneficiary of life insurance proceeds may turn on whether the requirements for diversity jurisdiction happen to be met in a particular case. There may also be a rush to the courthouse. A South Dakota resident can *file* a diversity case in South Dakota federal court, but may not *remove* a diversity case to South Dakota federal court. *See* 28 U.S.C. § 1441(b)(2) (no removal by

home-state defendant). Thus, a South Dakota resident who could benefit from the Eighth Circuit's rule will have an incentive to file a diversity-jurisdiction suit in federal court as quickly as possible following an ex-spouse's death. Finally, where, as here, the dispute is initiated through a life insurance company's interpleader action, the life insurance company may find itself in the awkward position of deciding who gets the money based on whether it files in state or federal court. These practical issues make this case an especially strong candidate for the Court's review.

III. THE EIGHTH CIRCUIT'S DECISION IS INCORRECT.

The Eighth Circuit erred in holding that the application of a revocation-upon-divorce statute to a contract signed before its enactment violates the Contracts Clause. As explained above, the *Whirlpool* rule has been criticized by multiple courts as well as the Joint Editorial Board for the Uniform Probate Code. For several reasons, those authorities are correct: the *Whirlpool* rule reflects an incorrect interpretation of the Contracts Clause.

In reviewing a Contracts Clause claim, "[t]he threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves*, 459 U.S. at 411 (internal quotation marks omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). "If the state regulation constitutes a

substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves*, 459 U.S. at 411-12 (citations omitted).

Under that standard, the application of Minnesota's revocation-upon-divorce statute to policies signed before its enactment complies with the Constitution. First, Minnesota's statute has not impaired a contractual relationship. As a threshold matter, and as the Eighth Circuit acknowledged, the statute could not have impaired any contractual relationship between *Respondent* and Metropolitan Life because no such relationship existed—the life insurance contract was between *Mark Sveen* and Metropolitan Life. Pet. App. 6a.

Even as between Mark Sveen and Metropolitan Life, there was no impairment of any contractual relationship, for several reasons. First, Metropolitan Life's contractual obligation was to pay out life insurance proceeds. The revocation-upon divorce statute did not affect that obligation. All the statute did was alter the identity of the recipient. That, however, did not constitute an impairment of the contract. As the Joint Editorial Board for the Uniform Probate Code explained:

> In [*Whirlpool*] and in comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract. The insurance company interpleads or pays the proceeds into court for distribution to the successful claimant. The

> divorce statute affects only the donative transfer, the component of the policy that raises no Contracts Clause issue.

Stillman, 343 F.3d at 1322 (quoting JEB Statement, *supra*).

Second, even if the statute impaired a contractual obligation, that impairment was not substantial. The statute did not prevent Mark Sveen from maintaining Respondent as his beneficiary; it "merely create[d] a default rule." *DeWitt*, 54 P.3d at 860. If Mark Sveen had wanted to retain Respondent as his beneficiary, all he had to do was contact the life insurance company after the divorce to re-designate her. This minimal additional burden did not substantially impair his contractual rights and expectations. Indeed, this case is a far cry from the types of impairments this Court has found "substantial." *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 (1987) (finding substantial impairment where a statute revived liabilities that had been previously extinguished by contract).

Third, even if the impairment were "substantial," there is "a significant and legitimate public purpose behind the regulation." *Energy Reserves*, 459 U.S. at 411. Revocation-upon-divorce statutes reflect the reality that divorcing spouses typically do not want their ex-spouses to receive their life insurance proceeds, but will sometimes forget to change their beneficiary designations after they get divorced. It is "legitimate" for the Minnesota Legislature to exercise its police powers to protect such individuals. *See Buchholz*, 740 N.W.2d at 114 (noting that any

impairment to contractual rights "is justified and reasonable in that it serves important public purposes," including "implementing a rule of construction that reflects legislative judgment that ex-spouses often intend to change their beneficiaries" (quotation marks omitted)).

This Court has recognized that, "[u]nless the State itself is a contracting party, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves*, 459 U.S. at 412-13 (internal quotation marks omitted; second and third alterations in original). There is no reason for the Court to overturn the Minnesota legislature's reasonable judgment here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 16-1172

Metropolitan Life Insurance Company

Plaintiff

v.

Kaye Melin

Defendant - Appellant

Ashley Sveen; Antone Sveen

Defendant - Appellees

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: November 17, 2016
Filed: April 3, 2017

Before BENTON and SHEPHERD, Circuit Judges, and EBINGER,[1] District Judge.

BENTON, Circuit Judge.

Mark A. Sveen designated his then-wife, Kaye L. Melin, as the primary beneficiary of his life insurance policy, and his children as contingent beneficiaries. Later, Minnesota extended its revocation-upon-divorce statute to life insurance policies. The district court awarded the proceeds to the children, rejecting Melin's argument that applying the statute retroactively is an impermissible impairment under the Contract Clause. Having jurisdiction under 28 U.S.C. § 1291, this court reverses and remands.

I.

Sveen purchased the life insurance policy in 1997 and married Melin later that year. The following year, he named her as the primary beneficiary and his two adult children as contingent beneficiaries. Sveen had additional life insurance with his children as primary beneficiaries. Melin and Sveen divorced in 2007. Sveen never changed the beneficiary designation on the policy.

In 2002, Minnesota amended its probate code to apply the revocation-upon-divorce statute to life insurance beneficiary designations: "the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the

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[1] The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa, sitting by designation.

individual's former spouse." Minn. Stat. Ann. § 524.2-804.

When Sveen died in 2011, Melin was still the primary beneficiary on the policy. The insurance company filed an interpleader to determine whether the revocation-upon-divorce statute revoked this beneficiary designation. Sveen's children—the contingent beneficiaries—and Melin cross-claimed for the proceeds. The district court granted summary judgment to the Sveens. This court reviews constitutional claims de novo. *Walker v. Hartford Life & Accident Ins. Co.*, 831 F.3d 968, 973 (8th Cir. 2016).

II.

A.

The Sveens argue that Melin lacks standing to assert a constitutional challenge to the revocation-upon-divorce statute.

A non-party may assert a claim under a contract if the individual is a third-party beneficiary. *See Dayton Dev. Co. v. Gilman Fin. Servs., Inc.*, 419 F.3d 852, 855 (8th Cir. 2005). Third-party standing is appropriate where: (1) the litigant "suffered an 'injury in fact,' [ ] giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) what the litigant seeks has a "close relation" to the rights of the absent party; and (3) there is "some hindrance to the [absent] party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991), *quoting Singleton v. Wulff*, 428 U.S. 106, 112 (1976).

A contested beneficiary like Melin has standing because: (1) she would suffer the loss of policy proceeds, a concrete injury, if the statute were applied; (2) she seeks to enforce the contract as written, vindicating Sveen's written intent; and (3) Sveen's death hinders his ability to protect his interest to enforce the contract. *See, e.g., Mearns v. Scharbach*, 12 P.3d 1048, 1055 (Wash. Ct. App. 2000) (holding former spouse had third-party standing to assert constitutional challenge to retroactive application of revocation-upon-divorce statute where policyholder's children were contingent beneficiaries).

B.

The Contract Clause prohibits a state law from "impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The prohibition, though not absolute, encompasses laws that "operate[ ] as a substantial impairment of a contractual relationship" and do not serve a legitimate public purpose or are not "based upon reasonable conditions and [ ] of a character appropriate to the public purpose." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410-12 (1983), *quoting first Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), *then quoting U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977).

This court has held that a revocation-upon-divorce statute like the one here violates the Contract Clause when applied retroactively. *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1324 (8th Cir. 1991). There, the husband had designated his then-wife as his beneficiary before Oklahoma passed its revocation-upon-divorce statute. *Id.* at 1319-20. Two years after the statute was passed, they divorced. *Id.* The husband never updated the

beneficiary designation. *Id.* This court held that automatically revoking an ex-spouse's beneficiary designation made before enactment of the statute would violate the Contract Clause. *Id.* at 1322. The unconstitutionality turned on the *policyholder's* rights and expectations:

> [A]t the time James designated Darlene as his beneficiary, Oklahoma law provided that she would remain the beneficiary unless and until he designated someone else; thus, when James attempted to order his personal affairs, this rule of insurance contract construction became a part of the insurance contract's obligations. James was entitled to expect that his wishes regarding the insurance proceeds, as ascertained pursuant to this then-existing law, would be effectuated. By reaching back in time and disrupting this expectation, the Oklahoma legislature impaired James' contract.

Id.

"It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002). The *Whirlpool* case controls this case. The Sveens argue that *Whirlpool* is distinguishable or, alternatively, should not be followed.

Though *Whirlpool* addressed an Oklahoma statute, both it and the Minnesota statute have the same effect: to disrupt the policyholder's expectations and right to "rely on the law governing insurance contracts as it existed when the contracts were made." *Whirlpool*, 929

F.2d at 1323. The Sveens argue that *Whirlpool* is distinguishable in several ways.

First, factually: The beneficiary in *Whirlpool* was the mother of the policyholder's four minor children, while Melin and Sveen had no children together. *Id.* Though the *Whirlpool* court noted it was "plausible" that the policyholder would want to provide financial security for his children by designating their caregiver (not his new wife) as the beneficiary, this court was explaining that the statute was just as likely to "either effectuate or frustrate his intent." *Id.* The holding rested on the policyholder's right to "rely on the law governing insurance contracts as it existed when the contracts were made." *Id.* The holding did not depend on the age or number of children. *See id.*

Second, the Sveens note that Minnesota law gives a beneficiary no vested interest in the policy. *See McCloud v. Aetna Life Ins. Co.*, 21 N.W.2d 476, 478-79 (Minn. 1946). This, too, is beside the point. What matters are the policyholder's rights and expectations, not any interest of the beneficiary. *See Whirlpool*, 929 F.2d at 1323.

Third, the Sveens stress that the Minnesota statute has exceptions allowing the policyholder to "opt out of the default rule of revocation." Not only is this irrelevant to *Whirlpool*'s focus on the policyholder's right to rely on the law at the time of contract formation, but *Whirlpool* itself found a similar escape insufficient. *Id.* The Oklahoma statute allowed a policyholder to "rename" a former spouse as beneficiary, but: "This fact does not cure the constitutional infirmity." *Id.* Similarly, here, that the statute would have allowed him

to opt out does not remedy the violation of Sveen's rights that would occur by applying the statute to "directly alter[ ] the obligations and expectations of the contracting parties." *Id.*

The rest of the Sveens' attempted distinctions either mischaracterize *Whirlpool* or do not confront its rationale—maintaining the policyholder's expectations under the law that existed at the time of contracting.

According to the Sveens, *Whirlpool* "undercuts the policy reasons served by revocation upon divorce statutes" because "there is no justification for extending Contract Clause concerns to a statute that only affects the donative component of a life insurance policy." *See, e.g., Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003) (disagreeing with *Whirlpool* and citing criticism by the Joint Editorial Board for the Uniform Probate Code). *But see Mass. Mut. Life Ins. Co. v. Curley*, 459 F. Appx. 101, 106 (3d Cir. 2012) (relying on *Parsonese v. Midland Nat. Ins. Co.*, 706 A.2d 814 (Pa. 1998) to reach the same result as *Whirlpool*). The *Whirlpool* case rejects this argument:

> The legislature, in passing this statute, determined that people fail to consider the need to change their insurance policies after experiencing a change in family relations. . . . However, this same conclusion suggests that an individual could rely on the pre-existing law and neither know nor expect that the rules governing his policy have changed, and thus might fail to consider the need to investigate potential changes in the law.

Whirlpool, 929 F.2d at 1323. This court's previous opinion forecloses any conclusion other than that the statute here is unconstitutional when applied retroactively.

* * * * * * *

The judgment is reversed, and the case remanded for proceedings consistent with this opinion.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Metropolitan Life Insurance Company,

Plaintiff,

v.

Kaye Melin, Ashley Sveen, and Antone Sveen,

Defendants/Cross-Claimants.

Civ. No. 14-5015 (PAM/LIB)

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' cross-Motions for Summary Judgment in this insurance interpleader case. For the reasons that follow, the Court grants the Motion of Ashley and Antone Sveen and denies the Motion of Kaye Melin.

BACKGROUND

Defendants/Cross-Claimants Kaye Melin and Ashley and Antone Sveen dispute the distribution of the proceeds of a life insurance policy issued to Melin's ex-husband and the Sveens' father, Mark Sveen.

Melin and Mark Sveen married in December 1997. Each had grown children from a previous relationship; they had no children together. In April 1998, Sveen bought a life insurance policy from Plaintiff Metropolitan

Life Insurance Company (MetLife) and named Melin as his beneficiary, with Ashley and Antone as contingent beneficiaries.

In 2002, the Minnesota legislature amended the probate code to provide that a divorce decree operated to revoke the beneficiary status of the former spouse on instruments such as life insurance policies, unless certain enumerated exceptions applied. Minn. Stat. § 524.2-804. One of those exceptions is that the parties could provide for the continued beneficiary status of the former spouse in the divorce decree. *Id.*

In 2007, Melin and Sveen divorced. The divorce decree mentions nothing about the life insurance policy, and provides that it is the complete agreement of the parties with regard to marital property. Melin contends that sometime during the divorce proceedings she and Sveen discussed the policy and orally agreed that Melin would remain the beneficiary under the policy. Melin also contends that she maintained a life insurance policy for which Sveen was the beneficiary, and that the alleged oral agreement also required her to maintain Sveen as the beneficiary under her policy.

Sveen killed himself in 2011. Faced with competing claims to the more than $180,000 in policy proceeds, MetLife brought this interpleader action under 28 U.S.C. § 1335. As the interpleader statute provides, MetLife deposited the policy proceeds into the Court's registry, and MetLife and Defendants have resolved all of MetLife's claims in the case. (Docket No. 48.) Thus, MetLife is only a nominal party to the action.

Melin and the Sveens have cross-moved for summary judgment, each arguing their entitlement to the proceeds of Mark Sveen's life-insurance policy.

DISCUSSION

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must view the evidence and inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir. 1996). However, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Melin contends that she is entitled to the policy proceeds for two reasons. First, she argues that the Minnesota beneficiary-revocation statute operates as an unconstitutional impairment of contract rights. *See* U.S. Const. art.1, § 10, cl. 1 (providing that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts). Second, she asserts that the oral agreement she allegedly made with Sveen fits within the statute's exceptions and allows her to remain the beneficiary under the policy.

According to Melin, the Eighth Circuit's determination that the Oklahoma beneficiary-revocation statute was unconstitutional governs here. *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991).

Whirlpool involved competing claims to a life-insurance policy by the decedent's ex-wife, to whom he had been married for 17 years and with whom he had four small children, and the decedent's new wife, whom he had married three weeks after divorcing his first wife and only three months before he died. *Id.* at 1319-20. The new wife was herself implicated in the decedent's death. *Id.* Oklahoma law enacted after the beneficiary designation but before the couple's divorce provided that a divorce operated to revoke beneficiary designations in favor of the policyholder's former spouse. Okla. Stat. tit. 15, § 178(A) (Supp. 1987). The Eighth Circuit determined that the Oklahoma statute was a retrospective substantial impairment of the decedent's contractual expectation that his first wife would be the policy beneficiary and was therefore unconstitutional. *Whirlpool*, 929 F.2d at 1322. The Oklahoma statute was subsequently amended to provide that it applied only to instruments signed after the date of its enactment. Okla. Stat. tit. 15, § 178(D) (1989). Perhaps because the statute was amended to eliminate any retrospective application of its terms, neither the Eighth Circuit nor any other federal court has revisited *Whirlpool*'s determination on the issue.

The *Whirpool* decision has been roundly criticized, however, including by the appellate court with jurisdiction over Oklahoma, the Tenth Circuit Court of Appeals. *See Stillman v. Teachers Ins. & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003) (finding *Whirlpool* unpersuasive and determining that Utah's revocation-of-beneficiary statute, which is the same as Minnesota's,

is constitutional). And indeed, the Uniform Probate Code's Joint Editorial Board took the unusual step of issuing a critique of *Whirpool*, noting that although beneficiary-revocation statutes do affect rights under an insurance policy, those statutes affect donative rights, not contractual rights, and thus do not run afoul of the Contracts Clause. 17 Am. Coll. Tr. & Est. Couns. 184 app. II at 3 (1991).

Two decisions in this District have addressed challenges to the Minnesota beneficiary-revocation statute that are similar to the instant challenge, with different results.

In 2007, Judge Donovan W. Frank determined that the Minnesota statute was not an unconstitutional impairment of contracts. *Lincoln Benefit Life Co. v. Heitz*, 468 F. Supp. 2d 1062 (D. Minn. 2007). In *Heitz*, the couple divorced in March 2002, just before the effective date of the Minnesota beneficiary-revocation statute. *Id.* at 1065. Before the divorce, the wife had been the beneficiary of the husband's life-insurance policy. *Id.* at 1064. The divorce decree listed the policy, and stated that the husband was awarded "all right, title, interest and equity" in the policy insuring his life. *Id.* at 1065. The husband died in 2005, having never removed his ex-wife as the policy beneficiary. *Id.* Judge Frank determined that the Minnesota statute did not substantially impair any vested contractual right because the ex-spouse had no vested interest in the policy proceeds until the policy owner's death, which occurred after the revocation statute took effect. He noted the distinction between contract rights, which are as between the policy owner and the insurance company,

and donative rights, which are as between the policy owner and the designated beneficiaries. *Id.* at 1067. He determined that the statute affects only donative rights, not contractual rights, and thus is not unconstitutional. *Id.* at 1067-68.

Judge Richard H. Kyle disagreed with Judge Frank and found the Minnesota statute unconstitutional in *MONY Life Insurance Co. v. Ericson*, 533 F. Supp. 2d 921, (D. Minn. 2008). In *Ericson*, the couple divorced in 1986, but the policy beneficiary paid the premiums on his ex-spouse's life insurance policy for 20 years, until her death in 2006. Judge Kyle found that the *Whirlpool* decision compelled the conclusion that the application of the Minnesota revocation statute would unconstitutionally impair the beneficiary's settled contractual interest in the policy.

Neither *Heitz* nor *Ericson* perfected an appeal, and thus the Eighth Circuit has not resolved this split of authority. But this Court agrees with the reasoning in *Heitz*: the Minnesota beneficiary-revocation statute is not an unconstitutional impairment of contracts in this case.

The test for whether a state law unconstitutionally impairs a contract is a stringent one. The party seeking to hold the statute unconstitutional must establish that there is a contractual relationship, that the law impairs that relationship, and that the impairment is substantial. *Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 551 (8th Cir. 1997). In the absence of a vested contractual right, there can be no protectable contractual relationship, and thus no impairment of contract. A beneficiary has no vested interest in a life

insurance policy until the insured dies. As *Heitz* noted, "[i]f the mere act of naming a person a beneficiary conferred a vested right upon that person, no owner of a policy could ever change his or her designation without the consent of the beneficiary, and the courts would be inundated with cases alleging breach of contract." *Heitz*, 468 F. Supp. 2d at 1067. The Minnesota statute did not unconstitutionally impair Melin's interests under the policy, because those interests had not vested when the statute came into force.

Finally, Melin's contentions regarding the alleged oral contract for her to remain the policy beneficiary do not prevent the application of the beneficiary-revocation statute here. She has no proof whatsoever of this alleged agreement. She does not remember when she and Sveen made the agreement, or any terms of the agreement other than the alleged term that Melin would remain the beneficiary under the policy, ostensibly in perpetuity. Under Minnesota law, the party seeking to prove an oral agreement must do so with clear and convincing evidence. *Merickel v. Erickson Stores Corp.*, 95 N.W.2d 303, 305 (Minn. 1959). Melin's own self-serving testimony does not constitute such evidence. As in *Heitz*, where the ex-spouse similarly claimed an oral agreement to remain the policy's beneficiary, Melin "has not produced clear and convincing evidence of the existence of an oral contract, and her attempts to do so violate the statute of frauds and/or the parol evidence rule." *Heitz*, 468 F. Supp. 2d at 1069-70.

CONCLUSION

Minnesota Statutes section 524.2-804 does not unconstitutionally impair Melin's contractual interest in

her ex-husband's life-insurance policy, because she has no such contractual interest. Thus, the statute operated to revoke the policy designation of Melin as the beneficiary. Nor is her evidence of an alleged oral agreement to circumvent the application of the statute legally sufficient to make that showing.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant/Counter-Claimant Kaye Melin's Motion for Summary Judgment (Docket No. 43) is **DENIED**;
2. Defendants/Counter-Claimants Antone and Ashley Sveen's Motion for Summary Judgment (Docket No. 50) is **GRANTED**; and
3. Defendants/Counter-Claimants Ashley and Antone Sveen, as contingent beneficiaries under the policy, are entitled to immediate payment of the insurance proceeds on deposit with the Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 7, 2016

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 29 2017
OFFICE OF THE CLERK

No. 16-1432

IN THE

Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

Petitioners,

v.

KAYE MELIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

State statutes that revoke life insurance beneficiary designations in favor of a spouse upon divorce have existed for more than twenty-five years. Nonetheless, only three federal courts of appeals and a small smattering of state high courts have been called upon to decide the question presented—whether retroactive application of such statutes violates the Contracts Clause.

The rarity with which this issue arises is unsurprising. The number of contracts to which these decades-old statutes might retroactively apply diminishes every day. And even among that shrinking set, the problem rarely comes up. For one thing, many divorce settlements (and divorce decrees) dictate what will become of key assets such as life insurance policies, and none of these statutes makes any difference where the parties themselves have allocated these assets. For another, these statutes cannot apply to the substantial portion of life insurance policies governed by ERISA or the Federal Employees' Group Life Insurance Act (FEGLIA) because federal law preempts them. In other words, the question presented generally matters only where, years ago, a couple had the foresight to obtain life insurance outside the confines of an employer's program; their state later adopted a revocation-upon-divorce statute; and the couple divorced but neglected to specify what would happen to the policy. Surely the Court has more pressing business to attend to.

The Court also need not worry that, absent its intervention, error will go uncorrected in cases like this one, because the decision below is correct.

Although revocation-upon-divorce statutes prove decisive in only a handful of cases, when they do, they directly alter a critical provision of the contract—the identity of the beneficiary. Nobody buys life insurance for the joy of knowing that the insurance company will pay some random person; "[s]election of a beneficiary is the entire point of a life insurance policy." *Parsonese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 818 (Pa. 1998). Applying these statutes retroactively thus substantially impairs contractual obligations without adequate justification.

The petition for certiorari should be denied.

STATEMENT

A. The Contracts Clause

The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. It protects legitimate contractual expectations and flows from "the high value the Framers placed on the protection of private contracts." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

Where, as here, the contract in question is between two private parties, this Court begins by asking "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* at 244 "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). Importantly, "[t]he obligations of a contract . . . includ[e] not only the express terms, but also the contemporaneous state law pertaining to interpretation and enforcement." *U.S. Trust Co. of*

N.Y. v. New Jersey, 431 U.S. 1, 19–20 n.17 (1977). Thus, "the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Id.* at 20 n.17.

Under the "literal[]," "unambiguous[]" terms of the Contracts Clause, one might think that a finding of substantial impairment would end the case. *U.S. Trust*, 431 U.S. at 20; *Spannaus*, 438 U.S. at 240. Nonetheless, this Court has said that "the contract clause is not an absolute and utterly unqualified restriction of the State's protective power," *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934), and that states may thus impair contractual obligations in certain circumstances. To do so, however, they must "have a significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at 411. And even if the State puts forward such an interest, its law can be upheld only if "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412 (quoting *U.S. Trust*, 431 U.S. at 22 (alterations in original)).

B. Revocation-Upon-Divorce Statutes

States began enacting revocation-upon-divorce statutes governing insurance policies over a quarter century ago. Under these statutes, divorce revokes life insurance and other beneficiary designations in favor of an ex-spouse (and, in many cases, in favor of any relatives of an ex-spouse not independently related to the decedent).

Today, such laws exist in approximately half of the fifty states. Among them is the 2002 Minnesota statute at issue here, which provides that "the dissolution or annulment of a marriage revokes any revocable . . . disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument." Minn. Stat. § 524.2-804, subd. 1. This rule of revocation is overcome "by the express terms of a governing instrument . . . executed prior to the dissolution or annulment of an individual's marriage, a court order, a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment, or a plan document governing a qualified or nonqualified retirement plan." *Id.* But in the absence of any of these or an express re-designation of the ex-spouse as a beneficiary, Minnesota treats such designations "as if the former spouse died immediately before the dissolution or annulment." *Id.* subd. 2.

C. Factual and Procedural Background

In December 1997, Respondent Kaye Melin married Mark Sveen. Pet. App. 9a. In April 1998—four years before Minnesota enacted its revocation-upon-divorce statute—Sveen designated Melin as the primary beneficiary of a life insurance policy. Pet. App. 9a–10a. He designated his children from a previous marriage, Petitioners Ashley and Antone Sveen (together, "the Sveens"), as contingent beneficiaries. Pet. App. 9a–10a. Mark Sveen also maintained other life insurance policies designating his children as primary beneficiaries, Pet. App. 2a, and Melin purchased a policy designating Sveen as the primary beneficiary, Dist. Ct. Dkt. #46 ¶ 3.

Sveen and Melin divorced in 2007, and Sveen died in 2011. Pet. App. 2a–3a. Sveen never altered his designation of Melin as the primary beneficiary on the policy at issue in this case, Pet. App. 2a, nor did Melin alter her selection of Sveen as the primary beneficiary of her policy until after his death, Dist. Ct. Dkt. #46 ¶ 15. After Sveen's death, the insurance company filed an interpleader action in U.S. District Court for the District of Minnesota to determine the proper beneficiary of the approximately $180,000 in policy proceeds. Pet. App. 10a. Melin and the Sveens filed competing claims. Pet. App. 3a. Melin relied on her express designation as the primary beneficiary. The Sveens argued that Minnesota's revocation-upon-divorce statute voided that designation and entitled them to the proceeds as the contingent beneficiaries. Melin responded that the statute violated the Contracts Clause as applied to beneficiary designations made prior to its enactment by impairing the contract between the decedent and the insurance company. Pet. App. 3a.

On cross-motions for summary judgment, the District Court agreed with the Sveens. The court concluded that the revocation-upon-divorce statute applied. It further held that application of that statute to the insurance contract in this case did not violate the Contracts Clause because Melin had only an expectancy interest in the proceeds, not a protectable contractual right. Pet. App. 15a.

The Court of Appeals for the Eighth Circuit reversed. It explained that although Melin herself lacked a contractual right to the policy proceeds, application of the Minnesota statute would impair Mark Sveen's contract with the insurance company by "disrupting

[his] expectations and right to rely on the law governing insurance contracts as it existed when the contracts were made." Pet. App. 5a (internal quotation marks omitted).

The Eighth Circuit and Justice Alito each declined to stay the Eighth Circuit's ruling, and the Sveens filed a petition for certiorari.

REASONS FOR DENYING THE PETITION

I. ANY SPLIT IS STALE AND INSIGNIFICANT.

Revocation-upon-divorce statutes have been on the books for over a quarter century and are currently in place in more than half the states. But in that time only six federal circuit or state high courts have confronted the question presented. There are good reasons for this rarity, which undermines Petitioners' claim (Pet. 17) that the question presented is "practically significant."

First, the number of contracts even potentially affected by the answer to the question presented decreases every day. Of the twenty-six revocation-upon-divorce statutes cited by Petitioners that would apply here,[1] fully half became effective over twenty years ago, including those of Texas, Ohio, Virginia,

[1] Three of the statutes Petitioners cite would not apply on the facts of this case. California's statute (in effect since January 1, 2002) expressly excludes life insurance contracts, Cal. Prob. Code §§ 5040(e), 5048(a), as does Missouri's statute (in effect since 1989), Mo. Rev. Stat. § 461.073(6). And Oklahoma's statute now applies only to contracts formed after the law's effective date. Okla. Stat. Ann. tit. 15, § 178(D).

and Washington.[2] Six more—including Michigan's, New Jersey's, and Wisconsin's—became effective between ten and twenty years ago.[3] Only three states have enacted such statues in the past five years.[4] And the Petition suggests (Pet. 18 & n.6) that only one state is seriously considering adding another.

Given this chronology, whatever theoretical importance the question presented might have once had is rapidly dissipating; everyone agrees that these

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[2] 1996 Alaska Laws Ch. 75 (H.B. 308) §§ 3, 20 (effective Jan. 1, 1997); 1994 Ariz. Sess. Laws, Ch. 290, §§ 6, 21 (effective Jan. 1, 1995); 1995 Colo. Legis. Serv. S.B. 95-43 §§ 14, 18 (effective July 1, 1995); 1996 Haw. Laws Act 288 (S.B. 2993) §§ 1, 5, 11 (effective July 1, 1997); 1993 Mont. Laws Ch. 494 (S.B. 119) § 71 (effective Oct. 1, 1993); 1993 N.M. Laws Ch. 174 (H.B. 12) §§ 63, 85 (effective July 1, 1993); 1993 N.D. Laws Ch. 334 (H.B. 1111) § 40; 1995 North Dakota Laws Ch. 322 (H.B. 1111) §§ 20, 27 (effective Jan. 1, 1996); 1995 S.D. Laws Ch. 167 (S.B. 66) §§ 2-804, 8-101 (effective July 1, 1995); 1990 Ohio Laws File 137 § 1 (effective May 31, 1990); Pa. Legis. Serv. Act 1992-152 (S.B. 1118) §§ 21, 28 (effective Dec. 16, 1992); 1997 Tex. Sess. Law Serv. Ch. 7 (S.B. 334) § 1 (effective Apr. 17, 1997); 1993 Va. Laws Ch. 417 (H.B. 1686) (effective July 1, 1993) (applies only to cases where the divorce occurred after the effective date); 1993 Wash. Legis. Serv. Ch. 236 (S.H.B. 1077) § 1, 1994 Wash. Legis. Serv. Ch. 221 (S.H.B. 2270) (effective Jan. 1, 1995).

[3] 2007 Iowa Legis. Serv. Ch. 134 (S.F. 540) §§ 4, 28 (effective July 1, 2007); 2002 Minn. Sess. Law Serv. Ch. 347 (S.F. 2540) § 2 (effective Aug. 1, 2002); 1998 Mich. Legis. Serv. P.A. 386 (S.B. 209) (effective Apr. 1, 2000); 2004 N.J. Sess. Law Serv. Ch. 132 (Senate 708) § 17 (effective Feb. 27, 2005); 1998 Utah Laws Ch. 39 (S.B. 75) §§ 84, 105 (effective July 1, 1998); 1998 Wis. Legis. Serv. Act 188 (1997 A.B. 645) §§ 175, 233 (effective Jan. 1, 1999).

[4] 2015 Ala. Laws Act 2015-312 (S.B. 222) §§ 1, 2 (effective September 1, 2015); 2016 Idaho Laws Ch. 362 (S.B. 1300) § 2 (effective July 1, 2016); 2013 S.C. Laws Act 100 (S.B. 143) §§ 1, 4 (effective Jan. 1, 2014).

statutes lawfully apply to contracts entered into after the statutes' effective dates, and the number of contracts that fall outside that category shrinks every day. For the same reason, Petitioners' observation (Pet. 17) that "[i]t is not every day that a federal court strikes down a duly-enacted state statute under the Contracts Clause" is overblown. There is no doubt that states may apply these statutes prospectively, and invalidating a handful of retroactive applications of them hardly impugns state sovereignty in some unusual fashion.

Second, even with respect to the contracts whose benefits might theoretically be affected by the question presented, the issue still rarely arises. Revocation-upon-divorce statutes do not apply where the parties negotiate—or where the divorce court specifies—the treatment of the benefits in question. For example, Minnesota's statute falls away where the "express terms" of a "court order" or a "contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment" addresses the issue. Minn. Stat. § 524.2-804, subd. 1.

The parties or the court will do so in a great many cases. A divorcing couple necessarily confronts the issue of splitting financial resources. For many families, life insurance policies and analogous post-employment benefits represent some of the now-divorcing couple's most significant assets. Accordingly, "[l]ife insurance often assumes an important role in a marital settlement agreement or divorce decree," either simply to support the "former spouse as beneficiary" or "as security for alimony or other payments to the former spouse." Danielle E. Miller,

Estate Tax Impact of Life Insurance Required by Divorce, 43 Est. Plan. 19, 19 (2016). Indeed, model agreements, treatises, and practitioners' guides are full of advice about addressing these issues and then carrying out the parties' (or the court's) instructions,[5] so much so that it is *malpractice* not to counsel a client about the need for and terms of such a settlement

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[5] *See, e.g.*, Joel R. Brandeis & Carole L. Weidman, LAW AND THE FAMILY: NEW YORK FORMS § 9:4 (Aug. 2017 update) (including in model separation agreement provisions that require the "Husband" to maintain life insurance in "such . . . amount as is necessary to insure his life for the full amount of all payments then due to the Wife by the Husband" with "the Wife as sole primary beneficiary thereof," as well as requiring the "Husband" to make the "Wife" the "irrevocable beneficiary" of enumerated existing policies); Louise Everett Graham & James E. Keller, Kentucky Practice Series, 15 DOMESTIC RELATIONS LAW § 9:8 (2016 update) (noting that "[c]arefully drafted agreements" should address "[t]he right to take insurance proceeds"); John J. Scroggin, *Divorce Planning from a Tax and Estate Planner Perspective*, 43 Est. Plan. 29, 34, 36 (2016) (noting that "[a]s a part of divorce settlements, one or both spouses may be required to maintain life insurance on their life for the benefit of an ex-spouse" and advising "divorcing couples" to "review their life insurance beneficiary designations and make changes as a result of the divorce"); Robert S. Hunter, 17 Illinois Practice Series, ESTATE PLANNING AND ADMINISTRATION § 28:30 (4th ed. 2016 update) (noting the importance of including "a provision in a property settlement agreement"); Sandy B. Giralamo & Pamela M. Magnano, A PRACTICAL GUIDE TO DIVORCE IN CONNECTICUT § 9.3.4 (1st ed. 2014) ("[I]f the practitioner is representing a spouse who is to be named the beneficiary of a life insurance policy . . . , the practitioner needs to request provisions in the divorce agreement or proposed orders for proof of life insurance and needs to either take steps to notify the insurer of the divorce orders or advise the client to take said steps.").

agreement.[6] And even if the issue somehow escapes the divorcing couple's, their lawyers', and the court's attention, the problem still rarely leads to litigation because "[i]n many cases" where the couple wishes to change the designated beneficiary, the policyholder does so "immediately following the entry of the divorce judgment" or in the years that follow. Megan Randlett et al., *A Divorce Judgment and a Beneficiary Designation: What Happens When They Conflict?*, 28 Me. B.J. 128, 128 (2013). In other words, there are strong incentives—and myriad opportunities—for divorcing and divorced couples to specify any change in the desired beneficiary, and the vast majority of couples will likely do so.

Third, even if a contract is old enough to predate a revocation-upon-divorce statute, and even if the parties failed to address the issue in their divorce instruments, and even if they forgot to update a supposedly outdated beneficiary designation afterward, the question presented still won't matter in a large percentage of the (few) remaining cases. Revocation-upon-divorce statutes cannot apply to many life insurance policies because ERISA preempts them as to the employer-provided policies it governs, *see Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), and FEGLIA does the same for the federal employee life insurance policies it controls, *see Hillman v. Maretta*, 133 S. Ct. 1943, 1949 (2013) (noting parties' agreement that revocation-upon-divorce statute was preempted); *id.* at 1949–55 (further holding that provisions attempting to evade

[6] *See, e.g.*, *Rice v. Poppe*, 881 N.W.2d 162, 173–74 (Neb. 2016); *Beaver v. Monaghan*, No. CV 09-5010965, 2009 WL 3286111, at *1 (Conn. Super. Ct. Sept. 11, 2009).

preemption by giving alternative beneficiaries a private cause of action against ex-spouses were themselves preempted). Together, policies governed by these laws make up a substantial portion of the American life insurance market; for example, group policies—which are governed by ERISA or FEGLIA when provided through a private or federal government employer—made up 42% of the life insurance policies in force in 2015. American Council of Life Insurers, Life Insurers Fact Book 2016, at 72 tbl.7.9. In these cases, too, the question presented is irrelevant.

If more were needed, the last twenty-five years have provided additional hard evidence that the question presented rarely arises. Petitioners point (Pet. 9–16) to only five federal circuit or state high courts that have been called upon to answer the question presented. Indeed, only one court has broken new ground on the issue in the almost ten years since the South Dakota Supreme Court decided *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007).[7] The other four courts Petitioners cite reached their decisions between 1991 and 2003—that is, between fourteen and twenty-six years ago.

Nor is this just a case of litigation failing to bubble up to federal circuit or state supreme courts. As far as Respondent can tell (and as far as Petitioners have proven), there are barely any of these cases at the lower rungs of the state and federal judiciary either. Fewer than two dozen decisions available on Westlaw

[7] *See Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017) (decided after the Petition was filed).

rely on any of these cases from the past two decades in addressing the question presented.

The absence of such cases is particularly striking in South Dakota. Petitioners worry (Pet. 20) about the possibility of a "rush to the courthouse" where "a South Dakota resident who could benefit from the Eighth Circuit's rule will have an incentive to file a diversity-jurisdiction suit in federal court as quickly as possible following an ex-spouse's death," while a competing out-of-state claimant will seek to file as quickly as possible in state court. Sounds good in theory, but where are the cases? The difference between the Eighth Circuit's position and the South Dakota Supreme Court's position has existed for almost a decade. But Petitioners have pointed to *no* case on this issue—nor is Respondent aware of any—that has been filed in those ten years in South Dakota federal *or* state court. In all likelihood, this dog didn't bark for a very good reason: it doesn't exist.

* * *

The question presented arises only where, many years ago, a couple had the foresight to purchase life insurance or other benefits outside the scope of employer-provided ERISA or FEGLIA plans and to expressly designate one spouse as the beneficiary, but lacked the wisdom to make their new intentions clear at some point prior to, during, or in the wake of their divorce. As the last twenty-five years of litigation have demonstrated, that scenario simply does not exist with the frequency needed to justify this Court's intervention.

II. THE EIGHTH CIRCUIT'S DECISION IS CORRECT.

There is also no need to intervene to correct error in this case, because there is none. As applied to pre-existing beneficiary designations, revocation-upon-divorce statutes alter a critical term of the contract without sufficient justification.

1. Revocation-upon-divorce statutes "directly alter[] the obligations and expectations of the contracting parties" on a key contract term: the identity of the beneficiary. *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991). "Selection of a beneficiary is the entire point of a life insurance policy." *Parsonese*, 706 A.2d at 818; *see also Whirlpool*, 929 F.2d at 1322 ("[O]ne of the primary purposes of a life insurance contract is to provide for the financial needs of a person . . . designated by the insured."). These laws thus "substantially impair[] contracts" by causing "a fundamental" "change in the[ir] very essence." *Whirlpool*, 929 F.2d at 1322; *see also Parsonese*, 706 A.2d at 818 ("[T]he contractual impairment . . . is indeed severe, virtually total.").[8]

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[8]Altering beneficiary designations interferes with contractual expectations particularly severely in the context of life insurance. While a beneficiary designation is "the entire point of a life insurance policy," *Parsonese*, 706 A.2d at 818, the same does not necessarily hold true for other contracts affected by revocation-upon-divorce statutes. By contrast, in some cases, owners of retirement accounts and annuities might primarily expect to receive retirement income themselves, with the selection of an alternate beneficiary only an ancillary consideration. It should thus come as no surprise that most of the cases rejecting Contracts Clause claims arose outside of the life insurance context. *See Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret.*

2. Following the lead of a 1991 statement from the Joint Editorial Board for the Uniform Probate Code, *see Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules As Applied to Pre-Existing Documents*, 17 Am. College Trust & Est. Couns. 184 (1991), Petitioners first attempt (Pet. 13 & n.2) to avoid this straightforward conclusion by dividing life insurance contracts into two components: (1) a contractual component, under which the insurance company is obligated to pay out policy proceeds; and (2) a donative transfer component, identifying the person to whom the proceeds must be paid. Petitioners assert that only interference with the first component could support a Contracts Clause claim.

Petitioners' argument proves too much. On their view, the Contracts Clause would provide no obstacle to a state statute that revokes *all* beneficiary designations and requires that insurance companies pay *all* policy proceeds to the first person who files a claim, to another insurance company, to the State, or to anyone else of the legislature's choosing. After all, such a law would apply only to the so-called "donative transfer" component of the life insurance contract. That cannot be right.

Fortunately, there is no basis for artificially dividing the contracts in this way. As noted above, the identity of the beneficiary is just as important to the

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Equities Fund, 343 F.3d 1311 (10th Cir. 2003) (annuities); *Storsve*, 740 N.W.2d 107 (retirement plan); *Lazar*, 862 F.3d 1186 (retirement plan). By contrast, in every case in which a federal circuit or state high court found a Contracts Clause violation, the contract in question was for life insurance. Pet. App. 1a–8a; *Whirlpool*, 929 F.2d 1318; *Parsonese*, 706 A.2d 814.

policy owner as the payment. That is why a breach-of-contract claim against an insurance company for mistakenly paying policy proceeds to the wrong person is just as viable as a claim that it mistakenly failed to tender a check at all. *See, e.g., Alexander v. Prudential Ins. Co. of Am.*, 292 N.W. 475, 476–77 (Mich. 1940); *J.C. Penney Life Ins. Co. v. Heinrich*, 32 S.W.3d 280, 284–85 (Tex. Ct. App. 2000); *see generally* 4 Couch on Insurance § 61.10 ("The insurer's payment of the proceeds of insurance to a person not entitled to the funds does not ordinarily relieve it of its liability to the proper beneficiary."). Petitioners' assertion (Pet. 21) that the insurance company's "contractual obligation was to pay out life insurance proceeds" is incorrect because it is incomplete. In fact, the contractual obligation was to pay out life insurance proceeds *to the beneficiary selected by the policy owner*. *See* Dist. Ct. Dkt. #52-2 at 3 (life insurance contract specifying that Respondent is the beneficiary); *id.* at 7, 19 (specifying the procedures required to change the beneficiary).

Accepting the donative transfer argument requires treating the life insurance contract as a different agreement than the one Mark Sveen struck with the insurance company—in other words, doing precisely what the Contracts Clause forbids. In effect, it treats Sveen himself as the beneficiary, who then gifts the proceeds on in a non-contractual transaction. To be sure, Sveen could have opted for something like that arrangement by designating his estate as the beneficiary and then separately disposing of the proceeds. But that is not what he did. Instead, he chose to contractually obligate the insurance company to pay the policy proceeds to Melin. In doing so, he was "entitled to expect that his wishes regarding the

insurance proceeds, as ascertained pursuant to . . . then-existing law, would be effectuated." *Whirlpool*, 929 F.2d at 1322.

3. Petitioners also argue that if revocation-upon-divorce statutes impair contractual obligations, they do not do so substantially because policy owners can reinstate ex-spouses' beneficiary status. Referring to the statutes as imposing a "default rule," Petitioners observe (Pet. 22) that "[i]f Mark Sveen had wanted to retain Respondent as his beneficiary, all he had to do was contact the life insurance company after the divorce to re-designate her." That is true as far as it goes, but it is equally true that "if Mark Sveen had wanted to [designate his children as his beneficiaries instead of Respondent], all he had to do was contact the life insurance company after the divorce to [so designate them]." Because the very premise of the revocation-upon-divorce statutes is that policy owners sometimes do not update their beneficiary designations, it makes no sense to think that their ability to do so renders the impairment of their contractual expectations "minimal." *See* Pet. 22; *cf. Whirlpool*, 929 F.2d at 1323 ("Having determined that some individuals are inattentive regarding their insurance policies, the . . . legislature can hardly expect these same individuals to be cognizant of changes in the law respecting those policies.").

Indeed, a policy owner's ability to re-designate his or her ex-spouse or expressly designate someone else as a beneficiary means that the statutes will prove decisive *only* when the policy owner takes no action. As noted above, Respondent questions the size of this set, particularly once policies governed by ERISA or FEGLIA and policies purchased after enactment of

revocation-upon-divorce statutes are properly removed from consideration. But whether the set is large or small, the fact remains that it consists of those who by hypothesis have not changed their beneficiary designations. The impairment of *these* policy owners' contractual expectations is therefore substantial.

4. Because retroactive application of revocation-upon-divorce statutes substantially impairs contractual obligations, such application is valid only if it furthers a "significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at 411. Moreover, "the adjustment of 'the rights and responsibilities of contracting parties [must be based] upon reasonable conditions and [must be] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412 (quoting *U.S. Trust*, 431 U.S. at 22) (third alteration in original). Petitioners cannot make the necessary showings.

Petitioners assert (Pet. 22) that "[r]evocation-upon-divorce statutes reflect the reality that divorcing spouses typically do not want their ex-spouses to receive their life insurance proceeds." But there is no such "reality," "certainly not a[s a matter of] universal truth." *Whirlpool Corp.*, 929 F.2d at 1323. To the contrary, "there are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds." *Hughes v. Sholl*, 900 S.W.2d 606, 607 (Ky. 1995). Some of these reasons are easily understood and widely applicable. For example, many couples use life insurance policies as a kind of investment, David F. Babbel & Oliver D. Hahl, *Buy Term and Invest the Difference Revisited*, 69 J. Fin. Serv. Profs. 92, 96 (2015), and want to ensure that both spouses get their fair share of that investment

after they have divorced. Other policyholders want their former spouses to have enough assets to care for their shared children after the policyholder's death, and they use the policy's proceeds to achieve that goal. *Whirlpool Corp.*, 929 F.2d at 1323. Still other former couples use life insurance proceeds to guarantee that each receives what he or she is due under the terms of the divorce settlement in the event of the other's early death. *See supra* at 9 & n.5.

Other reasons are more exotic. In one case, for example, the wife divorced her husband as a wake-up call to get help with his alcohol problem even though they continued to "live together and to function as a couple." *Am. Gen. Life Ins. Co. v. Jenson*, No. 11-5057, 2012 WL 848158, at *2 (D.S.D. Mar. 12, 2012). And in others, the parties desire to maintain the ex-spouse as the beneficiary for undisclosed reasons. *See State Farm Life Ins. Co. v. Davis*, No. 07-cv-164, 2008 WL 2326323, at *1 (D. Alaska June 3, 2008).

Regardless of why, many, many divorcing couples agree to maintain—or are ordered to maintain—life insurance coverage on one of the former spouses for the other's benefit.[9] Indeed, in the present case, Melin left Sveen as the beneficiary of her policy until after

---

[9] *See, e.g.*, *Jones v. Jones*, 206 F. Supp. 3d 1098, 1102 (E.D. Va. 2016); *Aderholt v. McDonald*, __ So. 3d __, 2016 WL 7321570, at *1 (Ala. Dec. 16, 2016); *Aramini v. Aramini*, 220 So. 3d 322, 325 (Ala. Civ. App. 2016); *Glanden v. Quirk*, 128 A.3d 994, 1006 (Del. 2015); *Ketcher v. Ketcher*, 188 So. 3d 991, 994 (Fla. Dist. Ct. App. 2016); *Sutherlin v. Sutherlin*, 802 S.E.2d 204, 207 (Ga. 2017); *Davis v. Davis*, 489 S.W.3d 225, 226 (Ky. 2016); *In re Lett Estate*, 887 N.W.2d 807, 814–15 (Mich. Ct. App. 2016); *Griner v. Griner*, __ So. 3d __, 2017 WL 2774610, at *8 (Miss. Ct. App. June 27, 2017); *Estate of Pierce*, 394 P.3d 316, 319 (Okla. Civ. App. 2016) (prenuptial agreement).

his death. Dist. Ct. Dkt. #46 ¶¶ 3, 15. In the era of no-fault divorce, the circumstances in which couples split are simply too varied for states to presume animosity and retroactively override beneficiary designations in favor of an ex-spouse. That may be why almost half of the fifty states have declined to do so, and why Congress has declined to implement a similar revocation-upon-divorce rule for policies covered by ERISA or FEGLIA. When applied retroactively, revocation-upon-divorce statutes are therefore not "of a character appropriate" to the supposedly intent-respecting purpose "justifying the legislation's adoption." *See Energy Reserves*, 459 U.S. at 412.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 16-1432

IN THE
Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,
Petitioners,

v.

KAYE MELIN AND
METROPOLITAN LIFE INSURANCE CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent[1] does not dispute that there is a square conflict of authority on the question presented: whether the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment violates the Contracts Clause. Nor does Respondent dispute that this case presents an ideal vehicle to resolve that conflict.

Instead, Respondent offers two arguments against certiorari. First, Respondent contends that the 4-2 split in this case reflects an insufficient number of judicial decisions to justify granting certiorari. Second, Respondent characterizes the split as "stale," despite the fact that in 2017 alone, the Eighth and Ninth Circuits have reached directly conflicting conclusions.

These contentions lack merit. A 4-2 split on a recurring issue of constitutional law is more than sufficient to warrant review under this Court's certiorari standards. The petition should be granted.[2]

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[1] "Respondent" refers to Kaye Melin. Petitioners identified Metropolitan Life Insurance Company as a respondent on the cover of the petition out of an abundance of caution, because that entity was identified as a party in the Eighth Circuit's case caption. But Metropolitan Life Insurance Company did not participate in the Eighth Circuit proceedings, did not file a Brief in Opposition here, and has no interest in the outcome of this case.

[2] By defending the merits of the Eighth Circuit's decision, Respondent draws into question the constitutionality of Minn. Stat. § 524.2-804, subd. 1, as applied to contracts signed before its enactment. Thus, Petitioners respectfully state that if the Court grants certiorari, 28 U.S.C. §2403(b) may apply. Petitioners also state that, in compliance with 28 U.S.C. §2403(b), the Eighth Circuit certified to the Attorney General of Minnesota the fact that the constitutionality of a Minnesota statute was drawn into

I. Respondent Does Not Dispute That This Case Presents An Ideal Vehicle To Resolve A Longstanding Conflict Of Authority.

The petition explained that there is a square and acknowledged conflict of authority on whether the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment violates the Contracts Clause. As the petition set forth, the Eighth Circuit and the Pennsylvania Supreme Court have adopted Respondent's position that the answer is "yes," while the Tenth Circuit, South Dakota Supreme Court, and Colorado Supreme Court have adopted Petitioners' position that the answer is "no." Pet. 9-17.

Respondent does not dispute that this split exists. Indeed, she candidly acknowledges that the split has deepened in the time since the petition was filed. As Respondent notes (BIO 11), in *Lazar v. Kroncke*, 862 F.3d 1186 (9th Cir. 2017), the Ninth Circuit acknowledged the split—and took Petitioners' side. The Ninth Circuit characterized *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), on which the decision below relied, and *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003), as "[d]ivergent [a]uthority." 862 F.3d at 1199-1200. It "agree[d] with the *Stillman* court" that the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment did not violate

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question, but Minnesota did not intervene. The Eighth Circuit's certification, dated April 4, 2016, is available on the Eighth Circuit's docket on PACER.

the Contracts Clause. *Id.* at 1200. Thus, there is now a 4-2 split among circuits and state high courts on the question presented.

Respondent's sole reference to the cases on Petitioners' side of the split consists of a footnote in the portion of the Brief in Opposition defending the Eighth Circuit's decision on the merits. In that footnote, Respondent states that the cases on Respondent's side of the split involve life insurance policies, whereas three of the cases on Petitioners' side of the split involved either annuities or retirement funds. BIO 13-14 n.8 (citing *Lazar*; *Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund*, 343 F.3d 1311, 1322 (10th Cir. 2003); and *Buchholz v. Storsve*, 740 N.W.2d 107 (S.D. 2007)). Respondent makes no argument, however, that this distinction undermines the conflict of authority, or is a reason to deny certiorari.[3] To the contrary, Respondent acknowledges that all six of the cases in the 4-2 split "have confronted the question presented." BIO 6. Indeed, *Lazar*, *Stillman*, and *Buchholz* each expressly rejected the Eighth Circuit's *Whirlpool* decision, rather

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[3] Nor would such an argument be credible. No court has ever suggested that the Contracts Clause analysis would differ depending on whether the contract at issue was an annuity, retirement fund, or life insurance policy. Respondent theorizes that some people who obtain annuities or retirement accounts might not subjectively care about the identity of their beneficiary. BIO 13-14 n.8. Even assuming that dubious assertion is correct, Respondent does not explain its relevance to the *legal* question of whether the application of the . evocation-upon-divorce statute to the beneficiary designation impermissibly revokes that designation.

than attempting to distinguish it. *Lazar*, 862 F.3d at 1199-1200; Pet. 12, 15-16 (discussing *Stillman* and *Buchholz*). Further, Respondent ignores *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), a case on Petitioners' side of the split arising in the specific context of life insurance. Pet. 13-15. Thus, even with respect to life insurance policies, there is an undisputed split, with the Colorado Supreme Court expressly parting ways with the Eighth Circuit and Pennsylvania Supreme Court. Pet. 14.

Nor is there any dispute that this is an ideal vehicle. The Petition explained the features of this case that made it a perfect vehicle. Pet. 17. In particular, Minnesota's statute reflects an implementation of Uniform Probate Code § 2-804, and this case presents a petition from a final judgment that turns entirely on the question presented. *Id.* Respondent does not dispute these points.

Several other premises of the Petition are similarly undisputed. Respondent does not dispute the inherent jurisprudential importance of a decision sustaining a constitutional challenge to a state statute. Pet. 17-18. Nor does Respondent dispute that a split is particularly harmful in the context of the Uniform Probate Code, which exists for the specific purpose of achieving uniformity. Pet. 18-19. Finally, Respondent does not dispute that this case presents a split between the federal and state courts in the same jurisdiction. Pet. 19-20.

The Court should grant certiorari in this case, where both parties agree that there is a square split on an issue of constitutional law, with no vehicle problems.

II. A 4-2 Split On A Recurring Question Of Law Warrants This Court's Review.

Rather than deny the split, Respondent insists that the question presented arises too rarely, and is too unimportant, to justify certiorari review. Those arguments are not persuasive.

First, Respondent argues that this case is too insignificant to warrant this Court's review because "only six federal circuit or state courts have confronted the question presented." BIO 6. That argument is inconsistent with this Court's certiorari practice. The Court routinely grants certiorari to resolve splits involving significantly fewer than six courts. Petitioners have identified eight different decisions from this Court since 2016 resolving 1-1 and 2-1 splits.[4] Petitioners are aware of at least three other such cases to be heard this Term.[5] A 4-2 split is more than sufficient to justify granting certiorari.

Equally unpersuasive is Respondent's contention

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[4] *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (1-1 split); *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split).

[5] *Rubin v. Islamic Rep. of Iran*, 137 S. Ct. 2326 (2017) (1-1 split); *Digital Realty Trust, Inc. v. Somers*, 137 S. Ct. 2300 (2017) (2-1 split); *Leidos, Inc. v. Ind. Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (2-1 split).

that the question presented arises with insufficient frequency in trial-level courts. Respondent claims to identify only "two dozen" reported cases adjudicating the question. BIO 11-12. She emphasizes that in South Dakota, the location of the federal/state conflict, there are no reported cases in the time since the South Dakota Supreme Court issued its opinion rejecting the Eighth Circuit's rule. BIO 12. However, many life insurance disputes arise in state courts, where lower-court decisions are rarely reported; reported decisions from South Dakota lower courts are particularly rare. And in view of the settled law in both South Dakota's state and federal courts, life insurance disputes would be expected to settle rapidly rather than reach final judgment. In any event, two dozen reported cases reflect sufficient percolation to warrant review.

Respondent also argues that the question presented is of diminishing importance because it applies only to contracts signed before a revocation-upon-divorce statute's enactment. Of course, the same could be said for *any* Contracts Clause case—the question presented in a Contracts Clause case is *always* whether a particular statute impermissibly interferes with contracts signed before a statute's enactment. Yet Respondent does not seriously suggest that Contracts Clause cases are inherently not worthy of this Court's review.

Moreover, the same could be said for *any* case presenting the question whether a new constitutional rule or statute applies retroactively, yet the Court regularly grants certiorari to resolve circuit splits on such issues. *See Welch v. United States*, 136 S. Ct. 1257

(2016) (deciding whether new constitutional rule applied retroactively); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (same); *Dorsey v. United States*, 567 U.S. 260 (2012) (deciding whether new statute applied retroactively); *Vartelas v. Holder*, 566 U.S. 257 (2012) (same). In *all* of those cases, the question presented had practical significance with respect to a diminishing number of cases, yet that was no barrier to this Court's review.

Further, there are two reasons to believe that the question presented will continue recurring frequently. First, because people commonly make beneficiary designations many years before they die, this question may arise many years after a revocation-upon-divorce statute is enacted. In *Lazar*, for instance, the beneficiary designation was made in 1992; the revocation-upon-divorce statute was enacted in 1995; the contracting party died in 2012; and the decision was issued in 2017. 862 F.3d at 1192-93; *see also Buchholz*, 740 N.W.2d at 109 (beneficiary designation occurred 24 years before enactment of statute and 35 years before death).

Second, the legislative trend has been to enact revocation-upon-divorce statutes. *See* BIO 6-7 nn.2-4 (noting numerous such statutes enacted in past 25 years). Although Respondent is correct that the pace of legislative activity has slowed, Respondent identifies new revocation-upon-divorce statutes that became effective in 2014, 2015, and 2016 (BIO 7 n.4), and we are aware of pending legislation in two additional states.[6]

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[6] Those states are Maine, Pet. 18 n.6., and Mississippi, 2017 MS

These new statutes will yield additional disputes. And given the trend in favor of enacting these statutes, other states may well follow suit. Indeed, the fact that two appellate decisions—the decision below and *Lazar*—have reached conflicting conclusions on the question presented 26 years after *Whirlpool* illustrates that this issue has staying power.

Respondent's remaining arguments seeking to diminish the practical importance of this case are makeweights. For instance, Respondent argues that the issue is unimportant because it will not affect the 42% of life insurance policies covered by ERISA or FEGLIA. BIO 11. But an issue potentially affecting 58% of life insurance policies nationwide is sufficiently important to warrant review.

Respondent also states that if divorce lawyers are sufficiently careful, the problem of divorcees who forget to update their life insurance policies will not arise. Respondent thus theorizes that the problem that revocation-upon-divorce statutes seek to solve—that a divorcing party will forget to update the beneficiary designation—arises so infrequently as to warrant denying certiorari. But this problem evidently arises often enough that it has prompted 29 different state legislatures to enact revocation-upon-divorce statutes to address that specific scenario—and by Respondent's count, *26* would be invalidated as applied retroactively if Respondent's proposed rule is correct. BIO 6.

A decision invalidating even *one* state statute on

H.B. 806, § 22. We had not discovered the pending Mississippi legislation when we filed the petition.

constitutional grounds is inherently significant. Here, the question presented undisputedly implicates the constitutionality of statutes in *26* states. The Court should not deem the legislation of so many states to be so inherently unimportant that certiorari should be denied, especially in the face of an undisputed split on an issue of constitutional law.

III. The Decision Below Is Incorrect.

The Ninth and Tenth Circuits, and Colorado and South Dakota Supreme Courts, are correct on the merits: the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment does not violate the Contracts Clause.

1. The Joint Editorial Board for the Uniform Probate Code is correct. After the "insurance company interpleads or pays the proceeds into court for distribution to the successful claimant," its contractual obligations have been satisfied; the "donative transfer ... component of the policy raises no Contracts Clause issues." Pet. 21-22 (quotation marks omitted). Rather, the donative transfer should be viewed as a matter of probate law, not contract law. *See Stillman*, 343 F.3d at 1322 ("There is no more an impairment of a contract than if Dale had made the beneficiary designation in his will, providing no instructions directly to TIAA-CREF."). Respondent maintains that this argument "proves too much," because it would imply that the Contracts Clause "would provide no obstacle to a state statute that revokes *all* beneficiary designations." BIO 14. Such a hypothetical statute is appropriately viewed as analogous to a state statute that revokes all beneficiary designations in a person's will. It would

raise grave policy concerns and perhaps concerns under other constitutional provisions, but not under the Contracts Clause.

2. Even if revocation-upon-divorce statutes impaired a contractual obligation, that impairment would not be substantial. As the Petition explained, if Mark Sveen had wanted to retain Respondent as his beneficiary, a simple letter to the life insurance company would have done the trick. Pet. 22. Respondent maintains that this argument "makes no sense," because "the very premise of the revocation-upon-divorce statutes is that policy owners sometimes do not update their beneficiary designations." BIO 16. Thus, Respondent argues, the "impairment of *these* policy owners' contractual expectations is therefore substantial." BIO 17. But revocation-upon-divorce statutes are intended to effectuate the presumed intent of policyholders—and when they accomplish that task, they advance, rather than impair, the policyholders' expectations. And for the few policyholders who want their ex-spouses to remain their beneficiaries, the burden of contacting the life insurance company is not a "substantial" impairment that warrants holding a state statute unconstitutional.

3. There is a "significant and legitimate public purpose behind the regulation" (Pet. 22): effectuating policyholders' presumed intent upon their divorce. Respondent theorizes a variety of "exotic" (BIO 18) reasons that policyholders may wish to maintain their ex-spouses as beneficiaries. But legislatures are entitled to legislate for the ordinary rather than the exotic case, and they are entitled to find that in the

ordinary case, people do not want their ex-spouses to receive life insurance proceeds. That legislative judgment deserves deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

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QUESTION PRESENTED

In 2002, Minnesota enacted legislation providing, in relevant part, that "the dissolution or annulment of a marriage revokes any revocable ... beneficiary designation ... made by an individual to the individual's former spouse." Minn. Stat. § 524.2-804, subd. 1. Thus, if a person designates a spouse as a life insurance beneficiary and later gets divorced, Minnesota law provides that the beneficiary designation is automatically revoked. At least twenty-eight other states have enacted similar revocation-on-divorce statutes.

The question presented is:

Does the application of a revocation-on-divorce statute to a contract signed before the statute's enactment violate the Contracts Clause?

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OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 1a) is reported at 853 F.3d 410 (8th Cir. 2017). The decision of the District Court (Pet. App. 9a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on April 3, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contracts Clause, U.S. Const. art. I, § 10, cl. 1, provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts."

Minnesota Statute § 524.2-804, subd. 1, provides:

> **Revocation upon dissolution.** Except as provided by the express terms of a governing instrument, other than a trust instrument under section 501C.1207, executed prior to the dissolution or annulment of an individual's marriage, a court order, a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment, or a plan document governing a qualified or nonqualified retirement plan, the dissolution or annulment of a marriage revokes any revocable:
>
> (1) disposition, beneficiary designation, or appointment of property made by an individual to the individual's former spouse in a governing instrument;

(2) provision in a governing instrument conferring a general or nongeneral power of appointment on an individual's former spouse; and

(3) nomination in a governing instrument, nominating an individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian.

INTRODUCTION

In 2002, Minnesota enacted legislation providing that "the dissolution or annulment of a marriage revokes any revocable ... beneficiary designation ... made by an individual to the individual's former spouse." Minn. Stat. § 524.2-804, subd. 1. Under that statute, if a person in Minnesota designates a spouse as a life insurance beneficiary and later gets divorced, the beneficiary designation is automatically revoked. The statute is designed to implement the presumed intent of policyholders: Most people who get divorced do not intend for their ex-spouses to remain as their beneficiaries. But the statute does not prevent a divorcing policyholder from keeping an ex-spouse as a beneficiary despite their divorce. The policyholder need only contact the insurer after the divorce to add the ex-spouse back to the policy.

This case presents the question of whether applying a revocation-on-divorce statute to a life insurance policy purchased before the statute's enactment violates the Contracts Clause. The facts are

straightforward. Mark Sveen married Respondent Kaye Melin in 1997. In 1998—before Minnesota adopted the relevant revocation-on-divorce provision in 2002—Mark Sveen designated Respondent as the primary beneficiary of his life insurance policy. The couple divorced in 2007 and Mark Sveen died in 2011. Minnesota's revocation-on-divorce statute—if applied according to its terms—requires that Respondent's status as Mark Sveen's beneficiary be revoked in light of their divorce. As a result, the statute requires that the policy proceeds go to Petitioners, Mark Sveen's children from a prior relationship who are the contingent beneficiaries named on his life insurance policy.

In the decision below, however, the Eighth Circuit held that Minnesota's revocation-on-divorce statute violates the Contracts Clause as applied to insurance policies purchased prior to the statute's enactment. In so doing, the Eighth Circuit did not hold that the statute impaired *Respondent*'s contractual rights—she had none, as she did not sign the contract. Rather, it held that the statute impaired *Mark Sveen*'s contractual rights by retroactively changing his beneficiary designation.

That decision was wrong. Most fundamentally, Minnesota's revocation-on-divorce statute is an exercise of the State's sovereign authority to regulate divorce. As Chief Justice Marshall explained, the Contracts Clause "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819). Thus,

even before the enactment of Minnesota's statute, divorce courts had the power to determine the effect of divorce on beneficiary designations. Minnesota's statute simply regulates the exercise of that power by providing a default rule for interpreting divorce decrees. The Contracts Clause provides no basis for interfering with a State's sovereign power to amend its divorce laws.

Even if the States did not have sweeping authority over divorce, Minnesota's statute still would be constitutional because it does not "impair[]" any "Obligations" within the meaning of the Contracts Clause. Minnesota's statute does not interfere with the policyholder's payment of premiums or the insurer's payment of proceeds. Rather, it affects the identity of the beneficiary—the unilateral choice of the policyholder, which is of no interest to the insurer. The insurer's only obligation is to proffer the life insurance proceeds and, if a dispute arises, pay them into a court registry. That obligation does not change if a statute alters the beneficiary's identity.

Furthermore, Minnesota's statute establishes a mere default rule that construes divorce as an exercise of the policyholder's option to alter a beneficiary designation. If a policyholder wants to keep his ex-spouse as beneficiary, a simple letter to the insurer would do the trick. Given that the statute leaves intact the policyholder's right to designate the beneficiary of his choosing, it does not impair any obligation.

Even if Minnesota's statute impaired the insurer's obligation, the impairment would be insufficiently substantial to implicate the Contracts Clause. A long

line of this Court's cases, dating back to the early Republic, hold that the mere requirement of preparing and filing a document is not a sufficient impairment of a contractual obligation to implicate the Clause, even if that requirement did not exist at the time the contract was signed. That line of cases makes this case straightforward: The policyholder's minimal burden of re-designating his ex-spouse as beneficiary cannot yield a Contracts Clause violation.

Critically, revocation-on-divorce statutes do not interfere with reliance interests. Virtually no one buys a life insurance policy in reliance on the absence of a revocation-on-divorce statute. Indeed, *invalidating* Minnesota's statute would be more likely to interfere with reliance expectations than upholding it. When Mark Sveen and Respondent negotiated their divorce settlement, the revocation-on-divorce statute was already on the books, and provided a background rule under which the beneficiary designation would be revoked unless the settlement provided otherwise. It is ironic that Respondent now invokes Mark Sveen's constitutional right to freedom of contract—at a time when he cannot share his point of view—as a mechanism to override the parties' freely-negotiated divorce settlement, which, under Minnesota law, should have revoked the beneficiary designation.

Even if Minnesota's statute substantially impaired contractual obligations, it would still be constitutional under this Court's modern Contracts Clause jurisprudence. This Court has adopted a highly deferential approach to the Contracts Clause, upholding statutes so long as they are a reasonable

means of attaining a legitimate end. Revocation-on-divorce statutes easily satisfy that test. This Court has scrutinized statutes to a greater extent when they involved contracts signed by the State or contracts that reflected the influence of special interests. But neither of those concerns arises in this case. Thus, the Court should not override the sound judgment of the Minnesota legislature.

STATEMENT

A. Statutory Background

This case concerns the constitutionality of Minnesota's revocation-on-divorce statute as applied to life insurance policies in force when the statute was enacted. Minnesota's revocation-on-divorce statute implements Section 2-804 of the Uniform Probate Code ("UPC"), a model code developed by the National Conference of Commissioners on Uniform State Laws in an effort to "update[] and simplif[y] most aspects of state probate law." *See* http://www.uniformlaws.org/Act.aspx?title=Probate%20Code.

Revocation-on-divorce statutes are a variation on an ancient theme. The law has long treated changed circumstances in an individual's life as automatically nullifying previously made bequests. At common law, "a man's will was revoked upon his marriage and the subsequent birth of issue, and a woman's by her subsequent marriage." *See* Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 Alb. L. Rev. 1035, 1039 n.31 (1992) (citations omitted). Such default rules came about

because it "was thought that the average testator would have desired revocation in these circumstances." *Id.*

As divorce became more common in the United States, state legislatures expanded that common law rule to divorce. Early revocation-on-divorce statutes generally applied only to wills. The first version of the UPC, promulgated in 1969, provided that "[i]f after executing a will the testator is divorced or his marriage annulled, the divorce ... revokes any disposition or appointment of property made by the will to the former spouse." UPC § 2-508 (pre-1990 version); *accord Restatement (Third) of Property: Wills & Donative Transfers* § 4.1 (1999). Most States have adopted UPC § 2-508 or similar legislation. *See* Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 Cornell L. Rev. 653, 653 n.2 (1988) (collecting statutes). Like their common law ancestors, these statutes reflect the principle that "a divorce should wipe the slate clean as to the divorced spouse, without the testator having to go to the time and expense of making a new will. We can be sure that in almost every instance a divorced person does not desire a bequest to the former spouse to remain in effect." *Bloomer v. Capps (In re Estate of Bloomer)*, 620 S.W.2d 365, 366 (Mo. 1981).

In 1990, the Uniform Probate Code extended this principle from probate assets disposed of through a will ("probate assets") to assets disposed of through other revocable instruments ("nonprobate assets"), "such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, [and]

transfer-on-death accounts." UPC § 2-804 cmt. "The theory of this section," *id.*, was that "the increased usage of will substitutes, such as revocable trusts," meant that the traditional revocation-on-divorce statutes did "not expressly cover[] all of the arrangements that are functionally equivalent to wills," Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 690, 692 (1992).

The current Section 2-804 of the UPC for revocable nonprobate assets thus mirrors the traditional revocation-on-divorce rule for probate assets in UPC § 2-508. It provides that "the divorce or annulment of a marriage ... revokes any revocable ... disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument," while defining the "[d]isposition or appointment of property" to include "any ... benefit to a beneficiary designated in a governing instrument ... executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse." UPC § 2-804(a)(2), (a)(4), (b). To date, fifteen states have adopted this provision in nearly identical form.[1] Several others have adopted

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[1] Alaska Stat. Ann. § 13.12.804; Ariz. Rev. Stat. Ann. § 14-2804; Colo. Rev. Stat. Ann. § 15-11-804; Haw. Rev. Stat. Ann. § 560:2-804; Idaho Code Ann. § 15-2-804; Mass. Gen. Laws Ann. 190B § 2-804; Mich. Comp. Laws Ann. § 700.2807; Minn. Stat. Ann. § 524.2-804 subd. 1; Mont. Code Ann. § 72-2-814; N.J. Stat. Ann. § 3B:3-14; N.M. Stat. Ann. § 45-2-804; N.D. Cent. Code Ann. § 30.1-10-04; S.C. Code Ann. § 62-2-507; S.D. Codified Laws § 29A-2-804; Utah Code Ann. § 75-2-804.

substantially similar statutes[2] And at least two other states are considering adopting similar legislation.[3]

The scope of UPC § 2-804 is limited in three significant respects. First, it applies "[e]xcept as provided by the express terms of a governing instrument." Thus, if an insurance policy expressly requires that the beneficiary designation not change in the case of a divorce, the statute does not apply.

Second, it applies "[e]xcept as provided by" a "court order" or a "contract relating to the division of the marital estate." Thus, if the parties expressly state in their marital estate settlement that the beneficiary designation will not be revoked, or the divorce court inserts such a provision into the divorce decree, the statute does not apply. The statute applies only when the divorce decree, and any agreement between the parties, are silent.

Third, the statute applies only to "revocable" beneficiary designations. This means that if the ex-spouse has a vested right to life insurance—such that the spouse is not contractually permitted to change it—the statute has no effect. It also means that the

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[2] Ala. Code § 30-4-17; Fla. Stat. Ann. § 732.703; Iowa Code Ann. § 598.20A; Nev. Rev. Stat. Ann. § 111.781; N.Y. Est., Powers & Trusts Law § 5-1.4; Ohio Rev. Code Ann. § 5815.33; 20 Pa. Stat. and Cons. Stat. Ann. § 6111.2; Tex. Fam. Code Ann. §§ 9.301, 9.302; Va. Code Ann. § 20-111.1; Wash. Rev. Code Ann. § 11.07.010; Wis. Stat. Ann. § 854.15.

[3] An Act Regarding Nonprobate Transfers on Death, H.P. 682, 128th Leg., 1st Reg. Sess. (Me. 2017); Nonprobate Transfers Law of Mississippi, 2017 MS H.B. 806, § 22, 132d Leg. Sess. (Miss. 2017).

policyholder can re-designate his ex-spouse as the beneficiary, if he so wishes. Thus, the revocation-on-divorce statute supplies a default rule, which the policyholder can override merely by alerting the insurer.

In April 2002, following unanimous votes in both houses of the Minnesota State Legislature, the Governor of Minnesota signed into law Minnesota Statute § 524.2-804, which implements Section 2-804 of the UPC.

B. Factual and Procedural Background

Mark Sveen purchased a revocable life insurance policy from Metropolitan Life Insurance Company ("MetLife") in 1997. Pet App. 2a. That same year, he married Respondent Kaye Melin and designated her as the primary beneficiary. *Id.* He named Petitioners Ashley Sveen and Antone Sveen, his children from a previous relationship, as contingent beneficiaries. Pet. App. 2a.

As noted above, Minnesota enacted its revocation-on-divorce statute in 2002. Mark Sveen and Kaye Melin divorced in 2007 and Mark Sveen died four years later. Pet. App. 3a, 10a. Mark Sveen never changed the beneficiary designations on the life insurance policy. *Id.*

Shortly after Mark Sveen's death, MetLife filed an interpleader action in the United States District Court for the District of Minnesota to determine who should receive the policy proceeds. Pet App. 3a. Petitioners and Respondent filed cross-claims for the money. *Id.*

The District Court ruled that Minnesota's revocation-on-divorce statute operated to revoke Respondent's beneficiary status and therefore granted summary judgment to Petitioners. Pet. App. 15-16a. The District Court rejected Respondent's claim that applying the revocation-on-divorce statute would violate the Contracts Clause, noting that "[t]he test for whether a state law unconstitutionally impairs a contract is a stringent one" and that "the Minnesota beneficiary-revocation statute is not an unconstitutional impairment of contracts in this case." Pet. App. 14a.

The Eighth Circuit reversed, reasoning that the application of Minnesota's revocation-on-divorce statute would violate the Contracts Clause if applied to a policy signed before that statute was enacted. Pet. App. 4a-5a, 7a-8a. In so holding, the Eighth Circuit considered itself bound by its previous opinion in *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), which held that Oklahoma's nearly identical revocation-on-divorce statute violated the Contracts Clause because it frustrated the policyholder's contractual rights and expectations with respect to beneficiary designations. Pet. App. 4a-5a. The panel recognized that *Whirlpool* had been criticized by both the Tenth Circuit and the Joint Editorial Board for the Uniform Probate Code. Pet. App. 7a. The panel nonetheless concluded that *Whirlpool* "foreclose[d] any conclusion other than that the [Minnesota revocation on-divorce] statute is unconstitutional when applied retroactively." Pet. App. 8a.

SUMMARY OF ARGUMENT

The application of a revocation-on-divorce statute to a life insurance policy purchased before the statute's enactment does not violate the policyholder's rights under the Contracts Clause.

I.A. Revocation-on-divorce statute are a permissible exercise of a State's sovereign authority over divorce. When spouses file for divorce, the divorce court is vested with broad authority to divide the parties' assets and sever the parties' relationship. As such, even in States without revocation-on-divorce statutes, divorce decrees routinely revoke beneficiary designations. Revocation-on-divorce statutes merely provide a default rule for construing divorce decrees that are otherwise silent on the effect of the divorce on a life insurance beneficiary designation. The Contracts Clause does not withdraw a State's sovereign authority to adjust its laws governing the interpretation of divorce decrees.

I.B. The history of the Contracts Clause confirms that revocation-on-divorce statutes are constitutional as applied to existing life insurance policies. As Chief Justice Marshall explained, the Contracts Clause "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819). Indeed, this Court has upheld the constitutionality of a statute that out-and-out divorced a couple. It follows that a statute that merely prescribes one consequence of a divorce decree is constitutional as well.

I.C. This Court should reject Respondent's position because it would impair States from amending their divorce laws—even prospectively. In this case, for example, the divorce took place years after the revocation-on-divorce statute was enacted, yet Respondent insists that the Constitution requires the divorce court to apply the law that was in place at the time the insurance policy was purchased. Private contracts should not prevent States from updating their divorce laws.

II.A. Revocation-on-divorce statutes do not impair any obligation of the insurer. In the event of a life insurance dispute, the insurer's obligation is to pay the policy proceeds to the court registry, and allow the court to decide the proper beneficiary. That obligation is the same before and after the enactment of the revocation-on-divorce statute. A statute that changes the identity of the beneficiary may affect the outcome of the court proceeding, but it does not affect the *insurer*'s obligation.

II.B. The foregoing analysis makes sense because it ensures that, for Contracts Clause purposes, beneficiary designations in insurance policies are treated the same as beneficiary designations in wills. The Contracts Clause should not distinguish between beneficiary designations in probate and nonprobate assets, particularly in light of the modern growth of nonprobate transfers.

II.C. Federalism considerations support upholding States' right to regulate post-death bequests, regardless of whether those bequests occur via probate or nonprobate transfers. Respondent's position would

potentially invalidate at least three other types of State statutes—"slayer" statutes, statutes regulating the treatment of adopted children in bequests, and statutes guaranteeing a statutory share of an estate to a spouse. Yet invalidating such statutes would be counterintuitive and entirely disconnected from the Contracts Clause's purposes.

III. Revocation-on-divorce statutes do not impair contractual obligations because they merely provide a default rule. If the policyholder wants his ex-spouse to be the beneficiary, he need only re-designate the ex-spouse as the beneficiary. Thus, the revocation-on-divorce statute does not interfere with the policyholder's contractual right to designate the beneficiary of his choice. Rather, it merely construes a divorce as the exercise of the contractual right to change the beneficiary, which is not an impairment of a contractual obligation.

IV.A. Even if revocation-on-divorce statutes impair contractual obligations, the impairment would not be substantial. This Court has long held that only substantial impairments of contractual obligations implicate the Contracts Clause. This longstanding view is consistent with the text and history of the Clause.

IV.B. The burden of re-designating an ex-spouse as a life insurance beneficiary is not a substantial impairment. A long line of this Court's cases has held that the requirement of filing a document does not substantially impair contractual obligations, even if that requirement did not exist at the time of contracting. For instance, this Court has upheld a statute providing that a bondholder's failure to object

to a settlement would be deemed to be the equivalent of express assent. The Court observed that "[i]f he does not wish to abandon his old rights and accept the new, all he has to do is to say so in writing to the president of the company." *Gilfillan v. Union Canal Co. of Pa.*, 109 U.S. 401, 406 (1883). Likewise, this Court has upheld multiple statutes that imposed recording obligations, even when those obligations did not exist at the time of contracting. These cases are dispositive: they establish that the paperwork obligation of re-designating an ex-spouse as beneficiary does not implicate the Contracts Clause.

IV.C. Revocation-on-divorce statutes do not interfere with reliance expectations. It is almost impossible to imagine a scenario in which a person purchases a life insurance policy in reliance on the absence of a revocation-on-divorce statute. Indeed, invalidating revocation-on-divorce statutes would likely interfere with reliance interests to a greater extent than the statutes themselves. For all we know, Mark Sveen did not change his beneficiary designation precisely *because* Minnesota's revocation-on-divorce statute rendered such a change unnecessary. Thus, awarding the proceeds to Respondent—in the name of vindicating Mr. Sveen's own purported Contracts Clause rights—might actually interfere with Mr. Sveen's expectations.

V.A. Even if revocation-on-divorce statutes substantially impaired contractual obligations, they would still be constitutional. This Court's modern Contracts Clause cases have adopted an exceedingly deferential standard under the Contracts Clause,

upholding State laws when statutes advance legitimate public purposes via reasonable means. Revocation-on-divorce statutes, which create a default rule of revocation in an effort to vindicate the presumed intent of divorcing spouses, satisfy that lenient test.

V.B. Revocation-on-divorce statutes do not present the political process concerns underlying the Contracts Clause. The historic purpose of the Contracts Clause was to protect against the prospect of special interests pressuring the legislature to release them from the obligations of unfavorable contracts. Yet neither insurers nor policyholders have any incentive to lobby the legislature to enact a revocation-on-divorce statute: Insurers have no interest in who gets the proceeds, while policyholders can change beneficiary designations without going to the legislature. The Court should not adopt an interpretation of the Contracts Clause that is so far removed from its purposes.

ARGUMENT

The application of Minnesota's revocation-on-divorce statute to a life insurance policy purchased before the statute's enactment does not violate the Contracts Clause.

Respondent does not contend that Minnesota's statute violates her own rights under the Contracts Clause. Nor could she, given that she was not a party to the contract at issue here; the insurance policy was a contract between the insurer and Mark Sveen. Rather, Respondent contends that the revocation-on-divorce statute unconstitutionally impaired Mark Sveen's contractual right to have the funds paid to Respondent

upon his death.

As explained below, that argument fails for several reasons. Revocation-on-divorce statutes are a permissible exercise of the State's sovereign authority over divorce. They do not impair, much less substantially impair, the policyholder's contractual rights. And even if they were a substantial impairment, they would still be constitutional because they are a reasonable means of advancing legitimate state interests. The Eighth Circuit's judgment should therefore be reversed.

I. REVOCATION-ON-DIVORCE STATUTES ARE A VALID EXERCISE OF STATES' SOVEREIGN AUTHORITY OVER DIVORCE.

When spouses get divorced, a state court issues a decree that severs the parties' legal relationship. The State has the sovereign authority to regulate the effect of divorce decrees, and Minnesota's revocation-on-divorce statute falls within that sovereign authority.

A. Revocation-on-Divorce Statutes Are an Exercise of the State's Regulatory Authority Over Divorce Courts, Which a Spouse Cannot Nullify Through a Private Contract.

Minnesota's revocation-on-divorce statute is an exercise of the State's police power over divorce, which Respondent may not evade via the Contracts Clause.

Divorce courts have "broad powers to distribute property in order to achieve an equitable distribution,

and to distribute both marital and nonmarital property to achieve an equitable division upon the dissolution of a marriage." 24 Am. Jur. 2d *Divorce and Separation* § 456, Westlaw (database updated Nov. 2017). Life insurance policies are one species of marital property that may be divided. John J. Michalik, *Divorce: Provision in Decree that One Party Obtain or Maintain Life Insurance for Benefit of Other Party or Child*, 59 A.L.R.3d 9 (1974) ("[A] decree in a divorce suit may properly contain a provision as to the disposition of insurance policies upon the life of the husband, in connection with either the award of alimony or the division of the property of the parties."). Indeed, "[f]or many couples, life insurance is, apart from their home, the largest single estate-planning device that they possess." *Vasconi v. Guardian Life Ins. Co. of Am.*, 590 A.2d 1161, 1163 (N.J. 1991); *see* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1110 (1984).

Thus, in all States—regardless of whether they have revocation-on-divorce statutes—divorce decrees routinely address the fate of beneficiary designations. Revocation-on-divorce statutes simply create an easily administrable default rule governing how divorce decrees will be construed. In States without revocation-on-divorce statutes, there is constant litigation over whether language in a particular divorce decree is clear enough to effectuate a revocation of life insurance beneficiary designations; some courts conclude that generic language is sufficient, while others demand clearer language or evidence of the parties' specific intent. *Compare, e.g.*, *Vasconi*, 590

A.2d at 1166 (decree specifying that party relinquished "'any claim on the other party of any kind whatsoever'" revokes beneficiary designation) (citation omitted), *with, e.g., Dubois v. Smith*, 599 A.2d 493 (N.H. 1991) (holding similar language insufficient to revoke beneficiary designation and finding insufficient evidence of spouses' intent to justify reforming decree). Indeed, in Minnesota, prior to the revocation-on-divorce statute's enactment, courts had reached conflicting conclusions on whether virtually identically-worded provisions of divorce decrees revoked beneficiary designations. *Compare Larsen v. Nw. Nat'l Life Ins. Co.*, 463 N.W.2d 777, 779-80 (Minn. Ct. App. 1990) (provision stating "[e]ach party may be awarded all right, title and interest in those life insurance policies covering his or her respective life" sufficient to revoke beneficiary designation based on specific facts showing parties' intent), *with In re Estate of Rock*, 612 N.W.2d 891, 895 (Minn. Ct. App. 2000) (provision awarding each party "all right, title and interest in and to any and all ... savings plans" insufficient to revoke beneficiary designations in view of surrounding facts). Minnesota's revocation-on-divorce statute forecloses the need for litigation on whether particular divorce decrees revoke beneficiary designations by setting a default rule for all decrees: The beneficiary designation is revoked, unless the decree specifies otherwise.

Two strands of this Court's Contracts Clause jurisprudence establish that a State may amend its divorce laws in this manner. *First*, this Court has held that the Contracts Clause does not inhibit a State from amending its laws governing traditional State

functions, even if those amendments affect existing contracts. As Justice Holmes explained, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter." *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). For instance, parties cannot prevent the State from imposing rates on common carriers, even if those rates displace rates negotiated through private agreements. *See Producers' Transp. Co. v. R.R. Comm'n*, 251 U.S. 228, 232 (1920) ("A common carrier cannot by making contracts ... prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power."); *accord Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 113 (1937); *Union Dry Goods Co. v. Ga. Pub. Serv. Corp.*, 248 U.S. 372, 374-77 (1919). There is a sound practical justification for this principle: Were it not the case, the Contracts Clause would "severely limit the ability of state legislatures to amend their regulatory legislation" because "[a]mendments could not take effect until all existing contracts expired, and parties could evade regulation by entering into long-term contracts." *General Motors Corp. v. Romein*, 503 U.S. 181, 190 (1992).

This principle establishes that the Constitution does not constrain a State from enacting a revocation-on-divorce statute that applies to existing life insurance policies. Minnesota's statute is part and parcel of a

traditional State function: the issuance of divorce decrees. The statute has no effect until the divorcing spouses affirmatively seek a state-issued divorce decree. When the spouses do seek such a decree, the statute serves as a tool for construing that decree. Thus, revocation-on-divorce statutes do not intrude on private arrangements. To the contrary, they regulate a decision that *already* was up to the divorce court—*i.e.*, the effect of divorce on the spouses' life insurance policies. Of course, in some cases, divorcing spouses negotiate a divorce settlement that is incorporated by the divorce court into the decree. In those cases, however, the statute becomes relevant only when the parties do not include an express term in their settlement resolving the fate of the insurance policy—and it does not take effect until the issuance of the state-issued decree severing the parties' relationship. Far from substituting the prerogative of private citizens with the prerogative of the State, therefore, the statute adopts a default rule regarding the effect of the State's exercise of one of its traditional functions, issuing divorce decrees. That simply does not implicate the Contracts Clause.

Indeed, in many States, not only may the divorce decree revoke a beneficiary designation, divorce courts can force a divorcing spouse to *maintain* his ex-spouse as a life insurance beneficiary in order to ensure her financial stability in the event of his death. Although there is some variation in state law on this issue, numerous courts have "held or recognized ... that the court in a divorce proceeding has the general and inherent power to require a husband to maintain

insurance on his life for the benefit of his former wife." Michalik, *supra*, 59 A.L.R.3d 9 (collecting cases). In Minnesota, courts possessed this power even before the enactment of Minnesota's revocation-on-divorce statute. *See, e.g., Laumann v. Laumann*, 400 N.W.2d 355, 360 (Minn. Ct. App. 1987). Such provisions are more intrusive than revocations of beneficiary designations because they prevent the divorcing spouse from exercising his contractual right to change the beneficiary—even if he wants to. Yet such provisions routinely appear in divorce decrees. It follows that States should have the more modest power to enact a statute providing that a decree revokes the beneficiary designation, unless the divorce court—or the policyholder—prefers otherwise.

Second, this Court has held that when a person signs a contract in a field that is heavily regulated, he cannot reasonably expect regulations to remain static. In *Veix v. Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32 (1940), for example, the Court rejected a Contracts Clause challenge to a statute regulating the withdrawal of shares from building and loan associations. It explained that building and loan associations had long been highly regulated, *id.* at 37; thus, when the contracting party "purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic," *id.* at 38. *Accord Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) ("Price regulation existed and was foreseeable as the type of law that would alter contractual obligations").

Divorce is the ultimate example of a regulated field. When parties file for divorce, the divorce court has complete power to determine the fate of all the parties' assets—including their right to receive income from contracts like annuities and insurance policies. *See supra* at pp. 17-18; *Swanson v. Swanson*, 583 N.W.2d 15, 18 (Minn. Ct. App. 1998) (annuities are divisible in divorce). Given that the State has plenary power over the disposition of assets in divorce, it is foreseeable that the State may adjust its statutes exercising that plenary power. The Contracts Clause does not confer a right that a State's divorce laws will remain static.

B. History Confirms That the Contracts Clause Does Not Restrict a State's Ability to Determine the Effect of a Divorce Decree.

The history of the Contracts Clause confirms that it does not bar a State from enacting legislation regulating the effect of a divorce decree on the divorcing spouses' relationship.

This Court has long held that "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). Applying that principle, this Court has long indicated that divorce legislation should be reviewed through a deferential lens. This Court's seminal decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (Marshall, C.J.), is most famous for Chief Justice Marshall's expansive interpretation of the Contracts Clause. But even Chief Justice Marshall took pains to note that the

Contracts Clause "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." *Id.* at 629. Likewise, James Kent's *Commentaries on American Law* declared that it "has generally been considered that the state governments have complete control and discretion" over the dissolution of marriages, and "in ordinary cases the constitutionality of the laws of divorce, in the respective states, is not to be questioned." 2 James Kent, *Commentaries on American Law* 89-90 (O. Halsted, ed. 1827).

Admittedly, neither Chief Justice Marshall nor James Kent specifically addressed statutes that set forth the effect of divorce on insurance policies; rather, they rejected the argument that divorce legislation impermissibly impaired *marriage* contracts. *Dartmouth*, 17 U.S. (4 Wheat.) at 629 ("Those acts enable some tribunals, not to impair a marriage contract, but to but to liberate one of the parties, because it has been broken by the other."); 2 Kent, *supra*, at 89-90 (similar). But their broad declarations of a State's power over divorce comfortably encompass statutes that prescribe one consequence of a divorce decree—*i.e.*, the revocation of a beneficiary designation. Indeed, if States have the power to enact legislation severing spouses' legal relationship altogether, they surely have the lesser power to enact statutes that merely define one particular respect in which divorce decrees sever that relationship.

Maynard v. Hill, 125 U.S. 190 (1888), similarly supports Petitioners' position. In *Maynard*, the Court confirmed that a divorce conferred by the legislature

did not violate the Contracts Clause, because marriage is not a "contract" within the meaning of the Clause. *Id.* at 210. The Court emphasized that the Contracts Clause does not limit the legislature's power to regulate "the duties and obligations [marriage] creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Id.* at 205. The Court further rejected the wife's argument that the divorce deprived her of property interests that would have vested if she stayed married: "A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone." *Id.* at 216.

The statute in this case is a considerably lesser infringement on reliance interests than the statute in *Maynard*. The *Maynard* statute out-and-out divorced the couple—thus extinguishing a wide array of future property interests—yet the Court had no difficulty upholding it. Here, the statute merely provides that one effect of a divorce decree is to revoke beneficiary designations—which the divorce court had the discretionary authority to accomplish even before the statute's enactment. Further, the statute permits a spouse to re-designate his ex-spouse as the beneficiary if he so chooses. It should be upheld as well.

C. Practical Considerations Support Upholding States' Sovereign Authority to Regulate Divorce.

The Court should reject Respondent's argument because it would significantly impair a State's authority to amend its divorce laws.

It is important to recognize that Respondent's position would restrict States from *prospectively* amending their divorce laws. In this case, for instance, Respondent contends that the revocation-on-divorce statute is unconstitutional as applied, even though it was enacted several years *before* the parties' divorce. In Respondent's view, the divorce court was constitutionally obligated to apply the law in force at the time the policy was purchased. Respondent's position would result in marital assets being subject to a checkerboard of laws in divorce—some would be subject to the laws in force at the time of the divorce, while others would be subject to long-repealed legal regimes. The result would be considerable practical difficulties in amending divorce laws.

Consider a concrete example. In the 1970s, a "revolution happened" in American divorce law. Brett R. Turner, *Equitable Distribution of Property* § 1:3, Westlaw (database updated Nov. 2017). As of 1970, "no American common-law state had a fair and sex-neutral property division system." *Id.* The general rule was that "a 'liberal' allowance for the wife was to receive upon divorce roughly one-third of the marital estate," and "[e]qual divisions were reserved for unusual cases." *Id.* But "[b]y 1983, every common-law property state in the country had adopted a workable property division system by either statute or court decision." *Id.*

These new statutes, designed to protect divorcing wives from financial harm, frequently applied to divorces where the parties had acquired property before the statute's enactment. This was for good reason:

> Had the legislature chosen to apply the concept of equitable distribution of property only to property acquired after the Act became effective, the full impact and purposes of the new act would not have been felt for at least a generation. Such prospective application would continue the very inequity which the legislature sought to remedy and would place the present generation of married couples at a decided disadvantage in comparison with subsequent generations of married couples. Moreover, in each dissolution proceeding involving property, courts would be presented with the impracticable dilemma of applying, depending upon the acquisition date of any disputed property, differing sets of laws and policies.

Kujawinski v. Kujawinski, 376 N.E.2d 1382, 1388 (Ill. 1978) (internal citation omitted).

For two reasons, these statutes impaired vested interests to a far greater extent than revocation-on-divorce statutes. First, they significantly altered asset distribution in divorce, as opposed to merely serving a gap-filling function for decrees otherwise silent on beneficiary designations. Second, they offered no opt-out opportunity for the divorcing spouses, unlike revocation-on-divorce statutes which allow the policyholder to re-designate his ex-spouse as beneficiary. Nonetheless, state courts routinely upheld such statutes against Contracts Clause and other constitutional challenges. *See, e.g., id.* at 1387; *Bacchetta v. Bacchetta*, 445 A.2d 1194, 1197-98 (Pa. 1982); *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me.

1977); *Rothman v. Rothman*, 320 A.2d 496, 499-504 (N.J. 1974). Courts reasoned that the acquisition of property does not confer "a vested right in a particular statutory procedure governing the disposition of property upon divorce." *Fournier*, 376 A.2d at 102.

Under Respondent's position, however, those statutes would have been unconstitutional as applied to previously acquired contractual interests—and any future changes to the law of property distribution would be unconstitutional for the same reason. The Court should not adopt an interpretation of the Contracts Clause that would severely constrain the States from updating their divorce laws.

To be sure, Congress could, through its Commerce Clause authority over insurers, enact statutes regulating the effect of divorce on beneficiary designations. Indeed, Congress has exercised that power—this Court has held twice, in recent years, that federal statutes regulating insurance preempted state revocation-on-divorce laws (neither federal statute applies here). *See Hillman v. Maretta*, 569 U.S. 483 (2013) (FEGLIA); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (ERISA). But Respondent's position would impose *constitutional* constraints on revocation-on-divorce statutes—even when there is no connection to interstate commerce and even when Congress *wants* to leave the decision up to the States. The Court should not constitutionalize the law of divorce in this way.

II. STATUTES AFFECTING THE DONATIVE COMPONENT OF A LIFE INSURANCE POLICY DO NOT VIOLATE THE CONTRACTS CLAUSE.

As previously explained, Minnesota's revocation-on-divorce statute implements Section 2-804 of the Uniform Probate Code. The Joint Editorial Board for the Uniform Probate Code has opined that the retroactive application of revocation-on-divorce statutes does not violate the Contracts Clause:

> A life insurance policy is a third-party beneficiary contract. As such, it is a mixture of contract and donative transfer. The Contracts Clause of the federal Constitution appropriately applies to protect against legislative interference with the contractual component of the policy. ... [T]here is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract. The insurance company interpleads or pays the proceeds into court for distribution to the successful claimant. The divorce statute affects only the donative transfer, the component of the policy that raises no Contracts Clause issue.

Stillman v. Teachers Insurance & Annuity Ass'n College Retirement Equities Fund, 343 F.3d 1311, 1322 (10th Cir. 2003) (quoting Joint Editorial Board statement and adopting its reasoning).[4]

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[4] The Joint Editorial Board's full statement is available on PACER. Appellant's Addendum at 9, *Melin v. Sveen*, 853 F.3d 410 (8th Cir. 2017) (No. 16-1172) (docketed Mar. 2, 2016).

The Joint Editorial Board's analysis is correct. Statutes affecting the donative component of an insurance policy raise no Contracts Clause issue. Rather, they should be viewed as analogous to statutes affecting beneficiary designations in wills, which raise no Contracts Clause issues.

Notably, this argument is completely independent of the prior argument. The argument in Part I focused on divorce law, while this argument focuses on the law of beneficiary designations. Both arguments apply in this case because Minnesota's statute governs the effect of divorce law, on beneficiary designations.

A. Statutes Affecting Life Insurance Beneficiary Designations Do Not Impair Contractual Obligations.

The Contracts Clause prohibits "Law[s] impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The premise of Respondent's position is that a statutory change to the identity of a life insurance beneficiary is a change in the insurer's "Obligation" under the Contracts Clause.

That premise, however, is incorrect. In reality, a life insurer's obligation is to pay the proceeds to the beneficiary under state law—whomever that beneficiary may be. If there is a bona fide dispute over the identity of the beneficiary, the insurer's obligation is to initiate an interpleader action and allow the court to decide. Properly understood, the insurer's obligation is not affected by a state law that changes the beneficiary designation.

This understanding of an insurer's obligation follows

from the fact that when a life insurance policy is contested—based on a revocation-on-divorce statute, or for any other reason—the insurer has no obligation to determine the identity of the beneficiary. Rather, the insurer's obligation is to initiate an interpleader action and deposit the funds in the court registry. At that point, the insurer's obligations are discharged; determining the beneficiary is up to the court. 16 *Couch on Insurance* § 232:74 (3d ed. 2017); *see, e.g.*, *Minn. Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977, 981 (9th Cir. 1999) ("Minnesota Mutual discharged any duty it owed to disburse the proceeds of the policy by filing the interpleader action and depositing the policy proceeds into the registry of the court."); *Conn. Gen. Life Ins. Co. v. First Nat'l Bank of Minneapolis*, 262 N.W.2d 403, 404 (Minn. 1977) (insurer "deposited disputed life insurance proceeds with the court and was dismissed from the proceedings"). Indeed, that is what occurred in this case.

Thus, the insurer's "obligation" was the same before and after the passage of Minnesota's statute. Before the statute, the insurer was required to give the funds to the named beneficiary unless there was a bona fide dispute, and if there was, initiate an interpleader action. After the statute, the same was true. Although the statute affects the ultimate recipient of the funds, it does not affect the *insurer's* obligation.[5]

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[5] Of course, if an insurer accidentally sends the proceeds to the wrong person, it can be liable for breach of contract. *See, e.g.*, 4 *Couch on Insurance* § 61:10. This is consistent with Petitioners' contention that the insurer's obligation is to convey funds to the beneficiary designated by State law: sending the proceeds to the

There is another doctrinal path to the same result. Respondent's position is that a change to the beneficiary alters the insurer's contractual obligations. But that cannot be right, because by that logic, any time the policyholder unilaterally changes the beneficiary, the insurer's contractual obligations are altered, without the insurer's consent. Yet black-letter contract law requires that contractual obligations cannot be altered without mutual assent. *Restatement (Second) of Contracts* § 89 (1981); *see also* UCC § 2-209. It follows that a change in beneficiary cannot constitute a change to the insurer's obligation.

B. Beneficiary Designations in Nonprobate Transfers Should Be Treated the Same Way as Beneficiary Designations in Wills.

The analysis above makes sense because it ensures that all beneficiary designations—whether in wills, trusts, or insurance policies—are treated the same way. By its terms, Minnesota Statute § 524.2-804 applies to all beneficiary designations, whether they are in a will, trust, or contract such as a life insurance policy. Indeed, the stated purpose of Uniform Probate Code §2-804 is to "unify the law of probate and nonprobate transfers." UPC § 2-804 cmt. (amended 1997).[6] It

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wrong person breaches that obligation.

[6] "Probate assets are those transferred by testate or intestate succession; non-probate assets are those transferred outside of probate, such as jointly owned property, life insurance proceeds, payable-on-death accounts or other revocable dispositions made by a divorced spouse to a former spouse before the dissolution." *In re Estate of Lamparella*, 109 P.3d 959, 961 n.1 (Ariz. Ct. App. 2005).

ensures that if a person designates a spouse in both a will and a nonprobate instrument such as an insurance policy, gets divorced, and fails to update both, the designations will be treated the same way.

Respondent's position would thwart that goal. The Contracts Clause would not bar the revocation-on-divorce statute from applying to wills predating the statute's enactment, because wills are not contracts. But the Contracts Clause would bar it from applying to insurance policies predating its enactment.

This result makes scant sense. The Constitution should not distinguish between beneficiary designations in wills and in insurance policies. The person making the designation is doing the same thing—unilaterally deciding who gets money after he dies. Of course, an insurance policy is a contract under the Contracts Clause, and a will is not. But the *reason* an insurance policy is a contract is that it involves reciprocal obligations between a policyholder and an insurer—the policyholder pays premiums, the insurer pays the proceeds—and those reciprocal obligations are unaffected by Minnesota's statute. The statute affects only the beneficiary's identity—a matter which is not negotiated, but is the policyholder's unilateral choice. The Constitution's treatment of that unilateral choice should not vary depending on whether it occurs in the context of a probate or nonprobate transfer. *Stillman*, 343 F.3d at 1322 ("That the donative transfer must be effectuated with the assistance of a party in a contractual relationship with the donor does not transmute the donative transfer into the performance of a contractual obligation. ... There is no more an

impairment of a contract than if [the decedent] had made the beneficiary designation in his will."); *Vasconi*, 590 A.2d at 1165 ("Would it not be anomalous in the extreme that the device chosen to give the insurance transfer the efficacy of a will serve to bring about a different post-divorce result in the case of the will substitute than the will itself?"); Langbein, *supra*, 97 Harv. L. Rev. at 1109 (arguing in favor of parallel treatment of beneficiary designations in probate and nonprobate transfers).

This makes even more sense when considering the ubiquity of nonprobate transfers today. Many people, upon their death, have multiple investments—for instance, bank accounts, an IRA, and a "whole" life insurance policy. Some of those assets will enter the estate and be transferred to heirs via a will; others will be transferred via a contractual beneficiary designation. *See* Langbein, *supra*, 97 Harv. L. Rev. at 1111. People often leave all their assets to the same heirs and neither know, nor care, about the precise mechanism by which the post-death transfer takes place. Yet under Respondent's position, the constitutionality of a revocation-on-divorce statute would turn on whether the transfer is probate or nonprobate.

Moreover, many people dispose of assets through revocable trusts rather than wills. In practice, revocable trusts and wills function very similarly—the difference is that post-death transfers take place via a trustee appointed through trust documents, rather than a will executor. *See* Robert H. Sitkoff & Jesse Dukeminier, *Wills, Trusts and Estates* 444-45 (10th ed.

2017). Although the Court has not resolved the constitutional status of revocable trusts, it has held generally that "trust deeds are contracts within the meaning of the contract clause of the Federal Constitution." *Coolidge v. Long*, 282 U.S. 582, 595 (1931). Given the close similarity between these instruments, it would be strange if revocation-on-divorce statutes are constitutional for wills and unconstitutional for revocable trusts.

C. Practical Considerations Support Upholding States' Authority to Regulate Beneficiary Designations.

Principles of federalism support upholding revocation-on-divorce statutes. "[T]he settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law." *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 451 (1943). Indeed, as previously explained, States have long treated changed circumstances in an individual's life as automatically nullifying previously made bequests. *Supra*, at pp. 6-7. Revocation-on-divorce statutes simply update those longstanding laws by applying them to divorce and non-probate transfers. *Supra*, at pp. 7-8. Given the traditional deference to States on laws governing asset succession upon death, the Court should allow States to decide how to regulate beneficiary designations.

Moreover, States have comprehensive regulatory regimes on beneficiary designations. Respondent's position would jeopardize several aspects of those regimes, yielding exceedingly counterintuitive results. To give three examples:

- *Slayer statutes.* Most States have "slayer" statutes, *i.e.*, statutes that prevent murderers from receiving the proceeds of their victims' life insurance policies. These statutes are routinely amended—for instance, in the past few years, several States have expanded them to prevent beneficiaries that commit elder abuse from receiving the proceeds of the decedent's life insurance policy. *See, e.g.*, 84 Okla. Stat. § 231 (2015); Mich. Comp. Laws Ann. § 700.2803 (2012). Under Respondent's view, these statutes violate the Contracts Clause as applied to existing policyholders, because they impair the insurer's obligation, under prior law, to give the proceeds to the abuser. Respondent's position would yield the unattractive prospect of abusers asserting the constitutional rights of their victims, under a theory of third-party standing, to obtain the insurance proceeds.

- *Adoption statutes.* At common law, a reference to "children" in a beneficiary designation did not encompass adopted children unless the designator was the adoptive parent. Thus, the phrase "my brother's children" would exclude adoptees. Courts reasoned that "[t]he status resulting from adoption proceedings is not a natural one," and one "has no moral right to impose upon his brother the status of an uncle to his adopted son." *Knoeller v. Uihlein (In re*

Estate of Uihlein), 68 N.W.2d 816, 820 (Wis. 1955). Today, this rule is viewed as anachronistic—an adoptee is as much a person's child as a biological child—and States have enacted statutes providing that adoptees are considered "children" in wills and life insurance policies. *E.g.*, Wis. Stat. 854.01(2), 854.20(1)(a). Yet under Respondent's position, such statutes would be unconstitutional as applied to existing policies because the insurer's contractual obligations would be "impaired." This result is very odd, given that such statutes have nothing to do with the reciprocal relationship between policyholder and insurer.

- *Spousal support statutes.* Most States have "statutory share" statutes requiring decedents to give a certain share of their estate to their spouses (typically one-third), and overriding any wills to the contrary. *See generally* 80 Am. Jur. 2d *Wills* § 1399, Westlaw (database updated Nov. 2017). These statutes are typically very old, and apply, by their terms, to probate assets. Thus, some courts have held that they do not guarantee the surviving spouse any share of non-probate assets, such as revocable trusts or insurance proceeds. *See, e.g., Poland v. Nalee (In re Estate of George)*, 265 P.3d 222, 230-31 (Wyo. 2011). In view of the modern trend toward nonprobate transfers, such decisions allow spouses to evade statutory

> share requirements by channeling their assets to nonprobate transfers. To address this problem, numerous States have enacted legislation guaranteeing the surviving spouse a share of the "augmented" estate—defined to include nonprobate assets such as revocable trusts and insurance policies. *See* Sitkoff & Dukeminier, *supra*, at 535 (noting that many States have enacted statutes that "include a list of nonprobate transfers that are added to the probate estate to constitute an *augmented estate* against which the surviving spouse's elective share is applied"); *see also* UPC 2-205(1)(D) (noting that "[p]roceeds of insurance" are included in the augmented estate); *id.*, cmt., para. 1, example 8 (same); Minn. Stat. § 524.2-205(1)(iii) (same). This is classic family-law legislation designed to protect surviving spouses that should fall comfortably within a State's police power, yet under Respondent's position, such statutes would unconstitutionally impair the obligations of the insurer.

Under Petitioners' interpretation of the Contracts Clause, these outcomes do not arise because statutes affecting beneficiary designations do not affect contractual obligations under the Contracts Clause. The Court should follow that intuitive approach.

III. REVOCATION-ON-DIVORCE STATUTES DO NOT IMPAIR CONTRACTUAL OBLIGATIONS; RATHER, THEY CONSTRUE DIVORCE AS AN EXERCISE OF CONTRACTUAL RIGHTS.

In Section II, Petitioners argued that a life insurer's contractual obligation is to give the funds to the beneficiary designated by State law—so statutes affecting beneficiary designations do not impair contractual obligations. But even if the Court concludes that the "obligation" is an obligation to give the funds to the beneficiary *of the policyholder's choice*, revocation-on-divorce statutes still would not impair any obligations. Rather, they merely construe a divorce as an exercise of a policyholder's option to change the designation.

Minnesota's revocation-on-divorce statute supplies a default rule. By its terms, the statute applies only to "revocable" beneficiary designations—that is, beneficiary designations that the policyholder has the right to change. Thus, if the policyholder wants to have his ex-spouse as the beneficiary, all he has to do is re-designate the ex-spouse as the beneficiary.

Thus, *before* the revocation-on-divorce statute's enactment, Mark Sveen had the right to designate the beneficiary of his choice. The same was true *after* the revocation-on-divorce statute's enactment. The insurer's obligation to give the proceeds to the policyholder's selected beneficiary did not change.

Of course, revocation-on-divorce statutes alter the identity of the beneficiary—but the mere change of the

beneficiary's identity is not an impairment of obligations. Consider first the scenario where a policyholder voluntarily changes the beneficiary designation. One would not say that the policyholder impaired the insurer's obligations, in the sense of altering the contract. The policyholder still owns the same insurance policy; he has simply exercised his option to change the beneficiary under that policy.

Likewise, many States provide that if a policyholder makes a good-faith but unsuccessful effort to notify the insurer of a change in beneficiary designation, the policyholder's intent will be effectuated, so long as the insurer is not prejudiced. *See, e.g., Lemke v. Schwarz*, 286 N.W.2d 693, 695 (Minn. 1979) (letter sent to policyholder's daughter sufficient to change beneficiary). If a State enacted legislation codifying that rule, the rule would not be retroactively *impairing* the policy; it would be setting forth the circumstances in which a policyholder's actions are construed as exercising a contractual right he possesses.

Revocation-on-divorce statutes are no different. They treat divorce as an event reflecting the policyholder's intent to revoke the beneficiary designation. They do not impair any obligations; instead, they leave the contract intact, and merely treat divorce as a constructive exercise of the policyholder's contractual right to change the beneficiary.

In this sense, revocation-on-divorce statutes are analogous to pretermitted-child statutes, which apply when a person names his child as the beneficiary in his will, has another child after the will is executed, and never changes the designation. Pretermitted-child

statutes create a presumption that the decedent intended to include after-born children as heirs—which the testator can overcome by amending the will to exclude them. *See, e.g.*, *Coulam v. Doull*, 133 U.S. 216, 230 (1890) ("The statute raises a presumption that the omission to provide for children or grandchildren living when a will is made is the result of forgetfulness, infirmity, or misapprehension, and not of design," but the "statutory presumption of an unexpressed intention to provide may be rebutted"). Historically, pretermitted-child statutes applied only to wills, but some States have extended them to certain nonprobate transfers such as revocable trusts (though not to life insurance policies). *E.g.*, Cal. Prob. Code § 21601.

It would be odd to suggest that such statutes impair the obligations of the trustee. They simply construe the child's birth as reflecting an implicit intent to make the new baby an heir. Revocation-on-divorce statutes are no different—they construe a significant life event (*i.e.*, a divorce) as reflecting an implicit exercise of a contractual right to change the beneficiary.

IV. REVOCATION-ON-DIVORCE STATUTES DO NOT "SUBSTANTIALLY" IMPAIR CONTRACTUAL OBLIGATIONS.

If the Court concludes that revocation-on-divorce statutes impair contractual obligations, it should nonetheless reverse, because that impairment is not substantial. All a policyholder must do to restore his ex-spouse as the beneficiary is send a simple notice to the insurer re-designating that person. A statute imposing such a minimal burden does not violate the Contracts Clause.

A. Only "Substantial" Impairments of Contractual Obligations Violate the Contracts Clause.

This Court has repeatedly held that for a statute to violate the Contracts Clause, it must *substantially* impair contractual obligations. *See General Motors*, 503 U.S. at 186 ("Th[e] inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial"); *Energy Reserves*, 459 U.S. at 411 ("The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship'") (citation omitted). A statute that merely alters contractual obligations, without a substantial impairment, does not violate the Contracts Clause. *Allied Structural Steel Co. v. Spannaus*, 436 U.S. 234, 245 (1978) ("Minimal alteration of contractual obligations may end the inquiry at its first stage."); *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) ("Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract.").

This well-settled rule is consistent with the text and history of the Contracts Clause. The word "impair" itself implies a degree of substantiality. "Impair" means "lessen, diminish, injure, hurt." *See* Noah Webster, *A Compendious Dictionary of the English Language*, at 151 (Philip B. Grove ed., 1970) (1806). Early cases similarly hold that the Contracts Clause is implicated by statutes that reduce the value of a

contract, rather than statutes that merely alter it. *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 32 (1823) (characterizing "conditions and restrictions tending to diminish the value and amount of the thing recovered" as posing constitutional concern).

Moreover, "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). It is thus consistent with longstanding tradition that for Contracts Clause purposes, an insubstantial impairment is not an impairment at all.

The drafting history of the Contracts Clause supports the view that it excludes statutes that merely alter, rather than impair, the obligations of a contract. The original draft of the Clause, proposed by the Committee of Style, barred the states from "*altering or* impairing the obligation of contracts." 2 *The Records of the Federal Convention of 1787*, at 597 (Max Farrand ed. 1937) (emphasis added). The Convention, however, deleted the words "altering or," thus narrowing the Contracts Clause's coverage to laws "impairing the Obligation of Contracts." *Id.* This history bolsters the view that statutes that merely alter, but do not impair, contractual obligations do not violate the Contracts Clause.

B. Revocation-on-Divorce Statutes Do Not Substantially Impair Contractual Obligations.

As noted in Section III, revocation-on-divorce statutes merely supply a default rule. The default effect of a divorce is to revoke beneficiary designations. But if a person wants to keep an ex-spouse as the beneficiary, all he must do is file a form with the insurer restoring the ex-spouse as the beneficiary.

Thus, the sole effect of Minnesota's statute on Mark Sveen's policy was to provide that in the contingent event of a divorce, he would be required to send a change-of-beneficiary form to his insurer if he wanted to keep his ex-wife as a beneficiary. A long and unbroken line of cases establishes that this minimal burden is not a sufficient "impairment" to implicate the Contracts Clause.

For instance, in *Gilfillan v. Union Canal Co. of Pennsylvania*, 109 U.S. 401 (1883), the legislature passed a statute providing that the failure of a bondholder to signify his refusal to concur in the agreement of a certain settlement would be deemed to be "equivalent to an express assent in writing." *Id.* at 403. The question was whether that statute "impaired the obligation of his bond." *Id.* The Court framed the question as whether it was "unreasonable to provide that a failure to dissent should be taken as an assent." *Id.* at 406. The Court upheld the statute. It explained the policy justifications for the statute, *id.* at 403-05, and pointed out that the burden on the bondholder was minimal: "If he does not wish to abandon his old rights and accept the new, all he has to do is to say so in

writing to the president of the company. Inaction will be taken as conclusive evidence of abandonment, just as the failure to bring suit within the time allowed by a statute of limitation is evidence of the abandonment of an existing cause of action." *Id.* at 406. Similarly, under revocation-on-divorce statutes, if a person prefers maintaining the ex-spouse as a beneficiary, "all he has to do is to say so in writing." *Id.* If he does not, the state construes his "[i]naction ... as conclusive evidence of abandonment" of the designation of his ex-spouse as beneficiary. *Id.* Such statutes should therefore be upheld as well.

This Court has also repeatedly upheld the application of statutory recording requirements to existing contracts. For instance, in *Jackson ex dem. Hart v. Lamphire*, 28 U.S. 280 (1830), this Court rejected a Contracts Clause challenge to a statute requiring the recordation of deeds. In that case, one John Cornelius received a land patent.[7] In 1797—after he received the patent—the New York Legislature enacted a statute stating that if a deed was not recorded, the purchaser would lose priority relative to a subsequent purchaser. Cornelius failed to record the deed, and a subsequent purchaser claimed priority. Cornelius' downstream purchasers argued that the statute violated the Contracts Clause because it retroactively stripped Cornelius of his contractual right to the land patent. This Court disagreed. It explained

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[7] This Court, in its first-ever Contracts Clause case, found land patents to be "contracts" under the Clause. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

that "[t]he state has not by this act impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius." *Id. at* 289. After explaining the policy interests advanced by recording acts, the Court concluded that State legislatures had the power to enact such statutes "whether the deed is dated before or after the passage of the recording act." *Id.* at 289-90. Thus, "[t]hough the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts." *Id.* at 290.

Likewise, in *Vance v. Vance*, 108 U.S. 514 (1883), this Court rejected a Contracts Clause challenge to a statute requiring the recording of certain mortgages, as applied to contracts predating the statute. The Court held that the recording requirement was intended to protect the mortgagor, as well as potential third party obligors, and did not "impair" contractual obligations under the Contracts Clause: "[T]he law, in requiring of the owner of this tacit mortgage, for the protection of innocent persons dealing with the obligor, to do this much to secure his own right, and protect those in ignorance of those rights, did not impair the obligation of the contract, since it gave ample time and opportunity to do what was required, and what was eminently just to everybody." *Id.* at 518; *see also Conley v. Barton*, 260 U.S. 677, 681 (1923) (upholding statute requiring existing mortgagees to complete affidavits within three months of foreclosure setting forth certain facts because statute "only imposes a condition, easily complied with, which the law, for its purposes, requires"); *Louisiana v. City of New Orleans*,

102 U.S. 203, 206-07 (1880) (upholding statute requiring the recordation of judgments, even though statute compelled contracting party "to do acts, preliminary to the payment of his judgments, not required when the contracts were made," because statute was a "convenient means of informing the city authorities of the extent of the judgments").

These cases establish that a statutory requirement of filing a document does not unconstitutionally impair contractual obligations, even if the requirement did not exist at the time the contract was signed. Here, too, the fact that Mark Sveen was required to file a new change-of-beneficiary form to restore Respondent as a beneficiary does not unconstitutionally impair contractual obligations.

Indeed, revocation-on-divorce statutes are even less of an impairment to contractual obligations than these recordation statutes. First, the statutory objective of the recordation statutes was to protect third parties, such as innocent future creditors who may be unaware of a mortgage. Here, the statutory objective is to protect the contracting party himself, by vindicating his presumed intent. Invalidating such a statute would be even further removed from the goals of the Contracts Clause, which is to protect the interests of people who sign contracts.

Second, with respect to recordation statutes, the failure to comply with the recordation requirement completely extinguished the contracting party's rights. For instance, in *Jackson*, the failure to record the deed rendered it worthless against a subsequent purchaser. Here, by contrast, the failure to send a writing to the

insurer typically *vindicates* the intent of the policyholder, who is presumed to intend to alter the beneficiary designation upon divorce. And even in those cases where the divorcing spouse does want the ex-spouse to remain on the policy, and is unaware of the revocation-on-divorce statute, the policy is not extinguished. Rather, the funds are redirected to the contingent beneficiaries, which is presumably of some value to the policyholder. In sum, if recordation statutes are constitutional, revocation-on-divorce statutes are as well.

Also on point is *Curtis v. Whitney*, 80 U.S. (13 Wall.) 68 (1871). In the nineteenth century (and still today), in some States, if a landowner was delinquent in the payment of taxes, the State would sell a "certificate of tax-sale" of the land to an investor; if the landowner did not redeem the property by paying off the debt within a specified amount of time, the investor could take possession of the property. In *Curtis*, this Court upheld a statute requiring a holder of a certificate of tax-sale to give notice to possessors of the land before taking the deed, even as applied to existing certificate holders. The Court observed that "[not] every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and National legislation." *Id.* at 70-71. The Court explained that the requirement did not "lessen the binding efficacy of plaintiff's contract," given that the "right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice."

Id. at 71.

This case presents even less of an "impairment" than the statute in *Curtis*. In *Curtis*, the notice would presumably increase the probability that the landowner would redeem the property—thus reducing the value of the certificate of tax-sale—yet the Court nonetheless upheld the statute. Here, if the policyholder files a change-of-beneficiary form with the insurer, he is returned to the precise situation he occupied before the statute's enactment.

Most recently, in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), this Court rejected a Contracts Clause challenge to Indiana's Mineral Lapse Act, which provided that certain mineral interests would lapse unless the mineral owner filed a statement of claim in the local county recorder's office. This Court observed that "a mineral owner may safeguard any contractual obligations or rights by filing a statement of claim in the county recorder's office. Such a minimal 'burden' on contractual obligations is not beyond the scope of permissible state action." *Id.* at 531. Likewise here, the minimal burden of filing a change-of-beneficiary form does not constitute a Contracts Clause violation—especially given that the failure to do so does not result in a complete lapse of contractual rights, as in *Texaco*, but a mere redirection of the proceeds to contingent beneficiaries.

C. Revocation-on-Divorce Statutes Do Not Interfere With Reliance Interests—but Invalidating Them Would.

This Court has held that in assessing whether a statute substantially impairs contractual obligations, courts should consider whether it interferes with the parties' expectations at the time of contracting. In *City of El Paso v. Simmons*, 379 U.S. 497 (1965), the Court considered the constitutionality of a statute providing that the right to reinstate forfeited contracts to buy land must be exercised within five years of the forfeiture. Under the prior law, the right to reinstatement was perpetual. The question was whether the new law, limiting the right to reinstatement, could apply retroactively to contracts signed before the law's enactment. The Court upheld the statute. It emphasized that "the promise of reinstatement ... was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking." *Id.* at 514. It "[did] not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement in case of his failure to perform, or that he interpreted that right to be of everlasting effect." *Id.* The Court concluded that "[t]his Court's decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change." *Id.* at 515.

Likewise, it cannot "seriously be contended" that the existing state of divorce law, or the absence of a

revocation-on-divorce statute, was the "central undertaking" or "primary consideration," or that the buyer was "substantially induced to enter into" the life insurance policy based on the state of the law at the time of contracting. *Id.* Indeed, for several reasons, it is unlikely that revocation-on-divorce statutes will interfere with *anyone*'s reliance interests at the time of contracting.

First, few people, when they sign a contract, rely on how that contract will be treated in a hypothetical divorce. This is especially true with respect to life insurance policies—most people who designate their spouse as an insurance beneficiary do so precisely because they do not intend to divorce, but want to support their spouse if they die during the marriage.

Second, even for people sufficiently cynical to be contemplating divorce upon the purchase of a policy, the statute would not interfere with their reliance expectations unless they were both sufficiently expert in the law to be aware that their State did not have a revocation-on-divorce statute, and sufficiently magnanimous to intend for their ex-spouse to remain the beneficiary upon that hypothetical divorce.

Third, even for such cynical, magnanimous legal experts, it is difficult to see how a revocation-on-divorce statute could possibly interfere with settled expectations. Prior to the enactment of Minnesota's statute, a policyholder could not have had any settled expectations on the effect of a hypothetical future divorce on his life insurance policy. As previously noted, *supra* at pp. 17-18, 21-22, even before the enactment of Minnesota's statute, some divorce decrees

revoked beneficiary designations; others forced a policyholder to maintain his ex-spouse as a beneficiary, even without the policyholder's consent. The effect of the divorce decree on the beneficiary designation would turn on future divorce settlement negotiations, or the decision of a future divorce court—neither of which the policyholder could have predicted at the time of contracting.

Indeed, the revocation-on-divorce statute applies only when a divorce decree does *not* address the effect of divorce on the life insurance policy. Few, if any, policyholders plan on having an *ambiguous* divorce decree, or rely on the law's treatment of ambiguous divorce decrees. And even for such policyholders, the interference with reliance expectations is miniscule, because the policyholder need only re-designate his ex-spouse as the beneficiary to restore the original beneficiary designation.

To be sure, revocation-on-divorce statutes enacted *after* divorces could interfere with reliance expectations *at the time of divorce*, if the divorcing spouses leave the decree silent with the assumption that the beneficiary designation stays intact. Of course, even in that scenario, a spouse has the option of mooting the statute's effect by re-designating the ex-spouse as beneficiary. But, it is possible that the spouse may be unaware of the post-divorce enactment of the revocation-on-divorce statute.

To the extent this scenario raises any fairness issues, however, they are not properly analyzed under the Contracts Clause. The Contracts Clause focuses on reliance expectations at the time of contracting, not at

the time of divorce. *El Paso*, 379 U.S. at 514. Moreover, in this case, the revocation-on-divorce statute could not have interfered with expectations at the time of the divorce—because the revocation-on-divorce statute was enacted *before* the divorce.[8]

Even if it were proper to consider disruption of reliance expectations at the time of divorce, rather than at the time of contracting, there is a countervailing concern. The *invalidation* of revocation-on-divorce statutes would likely interfere with reliance interests to a greater extent than the statutes themselves.

Consider matters from the perspective of Mark Sveen. Mark Sveen took his true intentions to the grave, and it is unknown whether he was aware of Minnesota's revocation-on-divorce statute. But for all we know, at the time of his divorce or thereafter, he learned that there was a revocation-on-divorce statute, and declined to change his beneficiary designation precisely because he knew that the statute made the change unnecessary. If so, he would be surprised to learn that his ex-wife is receiving the proceeds based on her vindication of his own purported constitutional rights under the Contracts Clause.

Indeed, an irony of this case is that Respondent and

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[8] Petitioners do not mean to suggest that the application of revocation-on-divorce statutes to divorces occurring before the statute's effective date would violate any *other* provision of the Constitution. Rather, Petitioners' point is that even if this scenario raised fairness concerns, the Contracts Clause would be irrelevant to those concerns, given that it does not distinguish between contracts signed before and after the divorce.

Mark Sveen negotiated and signed a divorce *settlement* which was incorporated into a divorce decree. The effect of Minnesota's statute—which was on the books at the time that settlement was negotiated—was to create a background rule that unless the settlement specified otherwise, the settlement would include an implied term revoking the beneficiary designation. Yet Respondent, who could easily have negotiated a divorce settlement that expressly preserved her status as the beneficiary, instead claims to be vindicating her ex-husband's constitutional right to freedom of contract—at a time when he has no ability to speak for himself.

Or consider matters from the perspective of people still alive today. Many people hire lawyers only once or twice in their lives—for instance, when they get divorced and during estate planning. Those lawyers may have told them that they do not need to change their beneficiary designations in their insurance policies, because of their State's revocation-on-divorce statute. If they do not follow this Court's jurisprudence closely, they may be unaware of a ruling holding that such statutes are unconstitutional as applied to policies predating their enactment, and their true intentions would be thwarted.

These anomalies do not arise in the typical Contracts Clause case; they arise here only because Minnesota's statute operates as a default rule. The Court should uphold the statute on that basis.

V. EVEN IF THEY SUBSTANTIALLY IMPAIR CONTRACTUAL OBLIGATIONS, REVOCATION-ON-DIVORCE STATUTES SERVE A LEGITIMATE PUBLIC PURPOSE.

For over eighty years, this Court has held that even if a statute substantially impairs the obligation of contracts, it is constitutional so long as it is a reasonable measure to pursue a legitimate State end. Revocation-on-divorce statutes easily pass muster under that standard.

A. Revocation-on-Divorce Statutes Easily Satisfy the Modern Reasonableness Test.

The leading modern Contracts Clause case is *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). *See El Paso*, 379 U.S. at 508 (characterizing *Blaisdell* as "a comprehensive restatement of the principles underlying the application of the Contract Clause"); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 15 (1977) (characterizing *Blaisdell* as "the leading case in the modern era of Contract Clause interpretation"). In *Blaisdell*, this Court upheld legislation suspending creditors' ability to foreclose on homes. The Court explained that legislation is constitutional under the Contracts Clause—even if it interferes with private contracts—if it "is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." 290 U.S. at 438.

Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983), sets forth a more detailed

articulation of the legal standard. "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Id.* at 411 (citation omitted). "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Id.* at 411-12. "[T]he public purpose need not be addressed to an emergency or temporary situation." *Id.* at 412. "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* (internal quotation marks and brackets omitted). "Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 412-13 (internal quotation marks and brackets omitted).

Under that deferential standard, revocation-on-divorce statutes are constitutional. First, such statutes serve a "significant and legitimate public purpose." *Id.* at 411. Such statutes "derive[] from the recognition 'that when spouses are sufficiently unhappy with each other that they obtain a divorce, neither is likely to want to transfer his or her property to the survivor on death.'" *Stillman*, 343 F.3d at 1318 (citation omitted). Thus, they "'reflect the legislative judgment that when

the transferor leaves unaltered a will or trust or insurance beneficiary designation in favor of an ex-spouse, this failure to designate substitute takers more likely than not represents inattention rather than intention.'" *Id.* (citation omitted). Moreover, even for attentive spouses, revocation-on-divorce statutes save them the time and paperwork of revoking their beneficiary designations by ensuring the revocation occurs automatically. The concept of automatic revocation of a bequest is not a new one—as previously noted, at common law, marriage automatically revoked wills. *Supra*, at pp. 6-7. It was perfectly legitimate for the legislature to extend that principle to divorce and nonprobate transfers.

To be sure, there will be some scenarios in which a person wants his ex-spouse to remain as the beneficiary. But the legislature made the empirical determination that, in the mine run of cases, the statute advances the policyholder's intent. State legislatures are well-situated to make empirical judgments about the typical presumed intent of divorcing spouses, and "[u]nless the State itself is a contracting party ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves*, 459 U.S. at 412-13.

Indeed, if vindicating a person's presumed intent was insufficient to uphold a statute under the Contracts Clause, then even "slayer" statutes would be unconstitutional as applied to existing policies. As noted above, "slayer" statutes provide that a person who murders the policyholder cannot receive the proceeds. *See supra* at p. 36. Such statutes are

amended regularly; as noted above, some States have recently expanded their coverage to beneficiaries who commit elder abuse. *Id.* Like revocation-on-divorce statutes, slayer statutes effectuate the policyholder's intent: they reflect the intuitive view that a victim of murder or abuse would not want the perpetrator to receive the proceeds. Yet, under Respondent's view, the statutes would be unconstitutional as applied to policies purchased prior to their enactment or amendment: The killer or abuser could assert his victim's constitutional rights against the impairment of contracts under the Contracts Clause as a mechanism for collecting life insurance proceeds. This result would be exceedingly counterintuitive.

Revocation-on-divorce statutes also serve two other useful functions. First, they ensure parallel treatment of beneficiary designations in wills and insurance policies. Even before the enactment of revocation-on-divorce statutes, an "overwhelming number of states" had "enacted statutes recognizing revocation by divorce" in the context of wills. *Vasconi*, 590 A.2d at 1164; *see supra*, at p. 7. Minnesota was one such State. Minn. Stat. Ann. § 524.2-508 (West 1975). Revocation-on-divorce statutes ensure that existing wills and existing insurance policies are treated the same way. *Supra* Section II.B. Second, as previously noted, revocation-on-divorce statutes avoid litigation on whether ambiguous divorce decrees revoke beneficiary designations. *Supra*, at pp. 18-19. Those purposes are "significant and legitimate." *Energy Reserves*, 459 U.S. at 411.

Revocation-on-divorce statutes are also of a

"'character appropriate to the public purpose justifying the legislation's adoption.'" *Id.* at 412 (citation and brackets omitted). They are mere default rules—in three different respects. First, they yield to an express statement in the insurance policy. Minn. Stat. § 524.2-804, subd. 1 ("Except as provided by the express terms of a governing instrument ... or a plan document"). Second, they yield to an express agreement between the spouses after the insurance policy, either as part of a divorce settlement or any other contract. *Id.* ("Except as provided by the express terms of a ... court order, [or] a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment."). Third, because they apply only to "revocable" beneficiary designations, *id.*, they yield to the insurer's choice to re-designate his ex-spouse as the beneficiary. In this sense they are less intrusive than "slayer" statutes, in which the victim obviously has no opportunity to redesignate the original beneficiary. This unobtrusive mechanism of vindicating policyholders' intent is reasonable.

This Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), underscores why revocation-on-divorce statutes should be upheld. In *Keystone*, this Court held that a statute preventing the enforcement of contractual waivers of liability for mining-related damages did not violate the Contracts Clause. The Court explained that "the prohibition against impairing the obligation of contracts is not to be read literally." *Id.* at 502. It pointed out that the Contracts Clause "was made part of the Constitution to

remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Id.* at 503 n.30 (internal quotation marks omitted). Thus, the Contracts Clause's "primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy." *Id.* at 503. The Court emphasized that "'the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.'" *Id.* (citation omitted). The Court concluded that the abrogation of the damages waiver at issue—though a substantial impairment on the right to contract—gave way to the state's "strong public interest" in preventing environmental harm. *Id.* at 505. It also found the impairment "reasonable." *Id.* Applying its standard that "unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure," this Court "refuse[d] to second-guess the [State's] determinations." *Id.* at 505-06.

Under *Keystone*, this case is easy. Revocation-on-divorce statutes do not adjust a pre-existing debtor-creditor relationship or include the State as a

contracting party; thus, a deferential standard applies. Such statutes are vastly less intrusive than the statute upheld in *Keystone*, which completely nullified valuable damages waivers in a manner directly contrary to the parties' intent.

To be clear, revocation-on-divorce statutes are constitutional even without the modern deferential standard of *Blaisdell* and *Keystone*. The cases described in Section IV, *supra*, largely date from the nineteenth century—an era of vigorous enforcement of the Contracts Clause—yet they strongly support the constitutionality of revocation-on-divorce statutes. But the modern standard of *Blaisdell* and *Keystone* leaves no doubt that revocation-on-divorce statutes are constitutional.

B. Revocation-on-Divorce Statutes Present None of the Political Process Concerns Underlying the Contracts Clause.

In *Energy Reserves*, this Court noted that the "requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." 459 U.S. at 412. For instance, the Court had invalidated legislation under the Contracts Clause that was "aimed at specific employers" and "may have been directed at one particular employer planning to terminate its pension plan when its collective-bargaining agreement expired." *Id.* at 412 n.13.

Similar justifications for the Contracts Clause date back to the Founding. Federalist No. 44 (James

Madison) explains:

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

The Federalist No. 44, at 288 (Clinton Rossiter ed., 1961).

Thus, without a Contracts Clause, special interests, disappointed by the contracts they signed, would persuade the legislature to extinguish them—reducing the incentive for entering into contracts in the first place.

It is striking how irrelevant that concern is to revocation-on-divorce statutes. *Neither* contracting party would have any interest in persuading the legislature to enact such statutes. The insurer—the party whose obligations are purportedly being

impaired—is indifferent to who gets the proceeds. Policyholders have no reason to petition the legislature—if they want to keep their ex-spouse on the policy, they just have to send a letter to the insurance company. Indeed, neither the policyholder nor the insurer ever actually litigates the constitutionality of revocation-on-divorce statutes—the cases invariably pit the ex-spouses against the contingent beneficiaries, neither of whom signed the contract or have any interest protected by the Contracts Clause. The Court should not extend the Contracts Clause to a circumstance so far removed from the justification for its enactment.

* * *

This brief set forth five independent rationales for upholding revocation-on-divorce statutes. First, they are permissible regulations of divorce. Second, they do not impair contractual obligations, because they affect the donative component of life insurance policies. Third, they do not impair contractual obligations, because they merely construe divorce as the exercise of a contractual option. Fourth, any impairment of an obligation is not substantial. Fifth, even if they cause a substantial impairment, they are reasonable.

Any one of these rationales is independently sufficient to uphold revocation-on-divorce statutes. In fact, all five are correct. The Court should therefore permit Minnesota's revocation-on-divorce statute to apply according to its terms.

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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No. 16-1432

IN THE

Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

Petitioners,

v.

KAYE MELIN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT KAYE MELIN

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QUESTION PRESENTED

Does the application of a revocation-upon-divorce statute to a contract signed before the statute's enactment violate the Contracts Clause?

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STATEMENT

"Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 245 (1978). The Framers agreed: "no State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

Minnesota passed such a law when it decreed that divorce would erase beneficiary designations even in pre-existing contracts. Here, Mark Sveen signed a contract with Metropolitan Life Insurance Company. He owed premiums, and in turn MetLife had an obligation to pay death benefits to the person Sveen designated. Following the letter of the contract, Sveen designated his then-wife Kaye Melin. But Minnesota thought better of that choice, and reversed it upon the couple's divorce.

Minnesota thus violated the absolute prohibition on laws impairing contracts. This Court once enforced that prohibition, and it should do so again. But even under modern jurisprudence, Minnesota's law may not be retroactively applied because it substantially impaired the obligation MetLife owed to Sveen without adequate justification.

A. Development of the Contracts Clause

1. After the Revolutionary War, new Americans faced desperate economic challenges. Several states attempted to alleviate those hardships through debtor-relief legislation that threatened the integrity of pre-existing contracts and trust in the nation-

al economy. To halt this trend, the Northwest Ordinance included a provision that "no law ought ever to be made or have force in the [Northwest] territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud previously formed." Northwest Ordinance of 1787, art. II.

Later that year, at the Constitutional Convention, Rufus King proposed to add a similarly phrased "prohibition on the States to interfere in private contracts." *Journal of the Federal Convention Kept by James Madison* 620 (E.H. Scott ed., 1893). Gouverneur Morris thought the clause went "too far," but Madison disagreed; although "inconveniences might arise," "on the whole [they] would be overbalanced by the utility of it." *Id.* at 620–621. The Convention agreed that "no State shall ... pass any ... Law impairing the Obligation of Contracts." *Id.* at 729–30.

Hamilton and Madison vigorously defended the provision. Hamilton described "laws in violation of private contracts" as "atrocious breaches of moral obligation and social justice," and as "another probable source of hostility" between the states. Federalist No. 7. Madison, too, thought such laws "contrary to the first principles of the social compact and to every principle of sound legislation." Federalist No. 44.

During ratification, Federalists and Anti-Federalists alike reinforced the importance of the Contracts Clause. South Carolina Federalist Charles Pinckney described Article I, Section 10, which contains the Contracts Clause, as "the soul

of the Constitution." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 333 (Jonathan Elliot ed., 2d ed. 1827) (Elliot). Similarly, Anti-Federalist James Winthrop proposed that it "be left to every state to make and execute its own laws, except laws impairing contracts, which shall not be made at all." James W. Ely, Jr., *The Contract Clause: A Constitutional History* 17 (2016) (quoting Agrippa Letter 16, Feb. 5, 1788, *in* The Essential Anti-Federalist (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002)).

The debates also confirmed that the clause absolutely prohibited laws impairing contracts. Maryland Anti-Federalist Luther Martin opposed the clause's adoption because he disliked that it prohibited debtor-relief legislation even on "very important and urgent occasions." Luther Martin, Genuine Information, *in* 3 The Records of the Federal Convention of 1787, at 172, 214–15 (Max Farrand ed., 1937). But as Madison explained, this was precisely the point: "The sober people of America," "weary of ... fluctuating policy," enacted "thorough reform" to "banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." Federalist No. 44

2. The judiciary embraced the Framers' categorical understanding. Ely, *supra*, at 22–23. Indeed, the first known federal decision invalidating a state law rested on the clause. *Id.* (citing *Champion & Dickason* v. *Casey* (C.C.R.I. 1792) (unreported)).

Chief Justice Marshall recognized that by including the clause in the Constitution, the people "man-

ifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 137–38 (1810). Accordingly, the Court quickly solidified the clause's broad reach. *See id.* at 138–39 (public and private contracts); *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (state-granted corporate charters). It also struck down a raft of state legislation. For example, while upholding states' power to pass insolvency laws before there was a federal bankruptcy system, this Court held that the Contracts Clause prohibited applying such laws to pre-existing contracts. *E.g.*, *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

Although absolute in its field, the Contracts Clause did not displace every law that might touch contracts. States remained free to pass prospective laws, *see Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213 (1827), laws that affected remedies but not obligations, *Sturges*, 17 U.S. (4 Wheat.) at 200, and laws that exercised the state's traditional police power, Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 Case W. Res. L. Rev. 597, 605 (1987). That latter limitation was quite narrow. "As then conceived," the police power "was not a comprehensive welfare power." *Chicago Bd. of Realtors, Inc.* v. *Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (opinion of Posner and Easterbrook, JJ.). It was instead the state's core power to protect "the public health, the public morals, or the public safety," *New Orleans Gas-Light Co.* v. *Louisiana Light & Heat Producing & Mfg. Co.*, 115 U.S. 650, 672 (1885),

which "rest[ed] upon the fundamental principle that every one shall so use his own as not to wrong and injure another," *Nw. Fertilizing Co.* v. *Village of Hyde Park*, 97 U.S. 659, 667 (1878). Because states could not contract away this power and private parties could not exempt themselves from it, attempts to do so were void from the start, leaving no contractual obligation to impair. *Stone* v. *Mississippi*, 101 U.S. 814, 819 (1879).

Where obligations *were* impaired, however, the clause's protection was absolute. *Planters' Bank* v. *Sharp* illustrates the Court's approach. It framed the question as "whether an act of the legislature ... impaired *the obligation of any contract* which the State or others had previously entered into." 47 U.S. (6 How.) 301, 318 (1848). "If it did," this Court stated flatly, "the clause in the Constitution of the United States, expressly prohibiting a State from passing any such law, has been violated." *Id.* Because the law at issue retroactively prohibited banks from discounting certain instruments or suing to collect on them, the law violated the clause. *Id.* at 326. End of story. *See also, e.g.*, *New Jersey* v. *Wilson*, 11 U.S. (7 Cranch) 164 (1812) (law repealing tax exemption); *Bronson* v. *Kinzie*, 42 U.S. (1 How.) 311 (1843) (mortgage moratorium law); *State Bank of Ohio* v. *Knoop*, 57 U.S. (16 How.) 369 (1854) (law requiring higher taxes than in charter).

State courts, too, voided a variety of laws. The Supreme Court of Errors of Connecticut, for example, enjoined the use of a bridge because a previous charter gave another company exclusive rights to build one. *Enfield Toll Bridge Co.* v. *Hartford & New-Haven R.R. Co.*, 17 Conn. 40 (1845). And in

invalidating a law revoking a tax exemption guaranteed by a charter, the Arkansas Supreme Court described the clause as "among the wisest" in the Constitution because "without it private rights would ... be liable to invasion by the enactment of laws consequent upon fluctuating policy, strong passions, and sudden changes." *State* v. *Crittenden Cty. Court*, 19 Ark. 360, 364 (1858).

After the Civil War, this Court reaffirmed that "any impairment of the obligation of a contract"—"the degree ... is immaterial"—was forbidden. *Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314, 318 (1872). And it continued striking down laws that impaired contracts, even contracts purchased with Confederate money. *E.g.*, *Delmas* v. *Merchants' Mut. Ins. Co.*, 81 U.S. (14 Wall.) 661 (1872); *see also, e.g.*, *Gunn* v. *Barry*, 82 U.S. (15 Wall.) 610 (1873) (law increasing homestead exemption).

3. Then came *Blaisdell*. Minnesota enacted a mortgage moratorium similar to the debtor-relief legislation that had prompted the Framers to include the Contracts Clause in the first place. The Court nonetheless upheld Minnesota's law. *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934).

The Court's reasoning was remarkable. The Court declared that the "great clauses of the Constitution" could no longer "be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them." *Id.* at 443; *see also id.* at 427 (eschewing the Convention debates as being "of little aid"). It downplayed the significance of the clause's appearing "in the same section with other ... prohibitions,"

such as the Ex Post Facto Clause. *Id.* at 427. And it accorded scant weight to "the occasion and general purpose of the clause." *Id.* at 428.

Instead, the Court held that the "general" clause "afford[ed] a broad outline," requiring the Court to "fill in the details." *Id.* at 426. In doing so, it relied on "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." *Id.* at 442. It concluded that "an emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community." *Id.* at 444. Because the law "was addressed to a legitimate end," "justified by the emergency," seemed "reasonable," and was "temporary," it was upheld. *Id.* at 444–47.

Justice Sutherland and three others rejected the Court's new approach. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Id.* at 483 (Sutherland, J., dissenting). Forecasting events to come, he warned that the Minnesota statute was "of trivial significance compared with the far more serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue." *Id.* at 448.

For a time, *Blaisdell*'s limits were important prerequisites for allowing contractual impairments. *See, e.g.*, *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 434 (1934) (invalidating retroactive exemption of life-insurance proceeds from attachment because the law "contain[ed] no limitations as to time,

amount, circumstances, or need"). But *Blaisdell*'s makeshift lines did not hold. In *El Paso* v. *Simmons*, the Court ignored *Worthen* and described *Blaisdell* as "a comprehensive restatement of the principles underlying the application of the Contract Clause." 379 U.S. 497, 508 (1965). It further indicated that courts must "respect the wide discretion on the part of the legislature in determining what is and what is not necessary" when impairing contracts. *Id.* at 508–09. Justice Sutherland proved prescient.

4. The modern Court has twice attempted to breathe life back into the clause. In *U.S. Trust Co. of New York* v. *New Jersey*, the Court observed that the Contracts Clause "remains a part of our written Constitution"; courts therefore "must attempt to apply" it by scrutinizing whether laws that "regulate existing contractual relationships ... serve a legitimate public purpose," with "reasonable conditions ... of a character appropriate to the public purpose justifying [their] adoption." 431 U.S. 1, 16, 22 (1977). In applying that test to void a New Jersey law impairing public contracts, the Court explained that "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives," nor is it "free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 30–31.

A year later, the Court invalidated a Minnesota law that imposed increased pension liability on companies that terminated a pension plan or closed a Minnesota plant. *Allied Structural*, 438 U.S. at 238. The Court explained, "if the Contract Clause is to retain any meaning at all, ... it must be under-

stood to impose *some* limits upon the power of a State to abridge existing contractual relationships." *Id.* at 242. The Court further explained that the pension law before it failed to meet *Blaisdell*'s conditions and "was not even purportedly enacted to deal with a broad, generalized economic or social problem." *Id.* at 250.

5. Nonetheless, the most recent cases have continued the descent inaugurated by *Blaisdell*. *U.S. Trust* limited its attempted reinvigoration by according private contracts less protection than public ones: where private contracts are at stake, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure," but "complete deference ... is not appropriate" where public contracts are involved "because the State's self-interest is at stake." 431 U.S. at 23, 26.

In this vein, *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.* upheld a statute abrogating contractual provisions between natural gas suppliers and a utility company to protect consumers from rising gas prices. In doing so, the Court gave "particular[] ... defer[ence]" to the legislature. 459 U.S. 400, 411–12 (1983). Other cases followed suit. *See Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 191–92 (1983) (upholding law that prohibited oil and gas producers from shifting tax increases to their purchasers regardless of contractual provisions because it "protect[ed] consumers from excessive prices"); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505–06 (1987) (upholding statute invalidating contractual waivers of the obligation to leave coal beneath certain structures because the

Court "refuse[d] to second-guess" the legislature's judgment of "the most appropriate ways of dealing with the problem").

Blaisdell took "us beyond the fixed and secure boundaries of the fundamental law into a precarious fringe of extraconstitutional territory in which no real boundaries exist." *Worthen*, 292 U.S. at 435 (Sutherland, J., concurring). Whatever boundaries remained have continued to erode, leaving a "defanged" Contracts Clause, *Chicago Bd. of Realtors*, 819 F.2d at 744 (opinion of Posner and Easterbrook, JJ.), that has largely "fallen into desuetude," Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526 (1987).

B. Revocation-upon-Divorce Laws

1. This case involves the collision of the Contracts Clause and revocation-upon-divorce statutes. Historically, divorce had no automatic effect on life-insurance contracts; if "an insured d[id] not change the beneficiary of his ... life insurance policy" after divorcing, "the ex-spouse beneficiary [wa]s entitled to the proceeds" upon the insured's death. *Larsen* v. *Nw. Nat'l Life Ins. Co.*, 463 N.W.2d 777, 779 (Minn. Ct. App. 1990).

That rule contrasts with states' treatment of wills, where divorce generally revokes such bequests. *See* Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 Cornell L. Rev. 653, 653 n.2 (1988). Courts have rejected expanding that rule to nonprobate assets such as life insurance, ACTEC Amicus Br. 9,

however, because wills and life insurance do fundamentally different things.

Life insurance "serves the essential economic and social functions of allowing ... [a] family ... to mitigate the risk of a loss resulting from premature death" by replacing lost income on which a beneficiary once relied. 8 Jeffrey E. Thomas, New Appleman on Insurance § 81.02[1]. Often, it is "the only means by which the average family can be supported in the event of the untimely death of a breadwinner." *Feminist Women's Health Ctr.* v. *Codispoti*, 821 P.2d 1198, 1201 (Wash. 1991) (en banc).

Wills—the "legal declaration of a man's intentions which he wills to be performed after his death," 2 William Blackstone Commentaries *499—serve a broader purpose. They too provide financial security, but they also bequeath property with mostly sentimental value, designate who will care for the testator's children, and spell out what happens to man's best friend.

2. It thus makes sense that divorce should affect wills and life insurance differently. A divorced spouse likely does not want his former spouse receiving grandma's quilt or administering his estate. But when it comes to life insurance, "divorce does not in all cases and automatically spell the end of interest in or even concern for one former spouse by the other," *In re Adams' Estate*, 288 A.2d 514, 517 (Pa. 1972), and "there are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds," *Hughes* v. *Sholl*, 900 S.W.2d 606, 607 (Ky. 1995).

Most obviously, "on separation or divorce, normally both spouses wish to assure their minor children's future," and "insurance provides a relatively painless manner to achieve this objective." *Franklin Life Ins. Co.* v. *Kitchens*, 57 Cal. Rptr. 652, 657 (Ct. App. 1967). By maintaining a former spouse—often one with primary custody—as the beneficiary, a policyholder ensures that the couple's children will continue to receive needed financial support after his or her death. *E.g.*, *Whirlpool Corp.* v. *Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991).

Similarly, many divorced couples use life-insurance proceeds to "assure[] that the supported spouse will not be left without means for support ... following the death of the obligor spouse." *Tintocalis* v. *Tintocalis*, 20 Cal. App. 4th 1590, 1594 (1993). Again, this reflects the obvious truth that divorce is seldom a clean economic break. No matter the parties' current feelings for each other, one often remains financially dependent on the other, and life insurance ensures that promises of continued support will be honored despite the insured's death.

Many couples also use life insurance as an investment and want both spouses to get their fair share of it. *See* David F. Babbel & Oliver D. Hahl, *Buy Term and Invest the Difference Revisited*, 69 J. Fin. Serv. Profs. 92, 99–101 (2015). Still others may divorce but continue to "live together and to function as a couple." *American Gen. Life Ins. Co.* v. *Jenson*, 2012 WL 848158, at *2 (D.S.D. Mar. 12, 2012). For these and myriad other reasons, many,

many policyholders maintain life-insurance coverage to benefit an ex-spouse.[1]

In keeping with these reasons, the longstanding non-revocation rule remains good law in almost half the states. Pet. Br. 8–9 & nn.1–2. The federal government, too, treats divorce itself as a non-event for policies governed by ERISA or the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA). Indeed, those statutes preempt state revocation-upon-divorce laws. *Hillman* v. *Maretta*, 569 U.S. 483 (2013); *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001). The United States has explained that revocation-upon-divorce statutes often do not "effectuate[] an insured's 'true' intent" because a policyholder "might want his ex-spouse to receive insurance proceeds for a number of reasons—out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse's custody." Brief for the United States as Amicus Curiae, *Hillman*, 2013 WL 1326956, at *28.

C. Facts and Procedural History

In December 1997, Mark Sveen and Respondent Kaye Melin married. Pet. App. 9a. In April 1998, Sveen designated Melin as the primary beneficiary of a life-insurance policy he bought from MetLife. Pet. App. 9a–10a. He designated his children from a previous marriage, Petitioners Ashley and Antone Sveen, as contingent beneficiaries. Pet. App. 10a.

[1] *E.g.*, *Sutherlin* v. *Sutherlin*, 802 S.E.2d 204, 207 (Ga. 2017); *Davis* v. *Davis*, 489 S.W.3d 225, 226 (Ky. 2016); *Estate of Pierce*, 394 P.3d 316, 319 (Okla. Civ. App. 2016) (prenuptial agreement).

Sveen also maintained other life-insurance policies designating his children as primary beneficiaries, Pet. App. 2a, and Melin purchased a policy and designated Sveen as the primary beneficiary, Dist. Ct. Dkt. #46 ¶ 3.

When Sveen bought his policy and designated Melin, Minnesota law specified that an ex-spouse beneficiary would receive the proceeds upon the insured's death unless the insured had changed the designation. *See Larsen*, 463 N.W.2d at 779. Moreover, Eighth Circuit precedent precluded retroactive application of revocation-upon-divorce statutes. *Whirlpool*, 929 F.2d at 1322.

In 2002, Minnesota enacted its revocation-upon-divorce statute. Minn. Stat. § 524.2-804. Sveen and Melin divorced in 2007, and Sveen died in 2011. Pet. App. 2a–3a. Sveen never altered his designation of Melin as the primary beneficiary before his death, Pet. App. 2a, nor did Melin change hers until after Sveen's death; as she contended below, they had orally agreed to leave the designations in place, Dist. Ct. Dkt. #46 ¶¶ 3, 10, 15.

MetLife filed an interpleader action, and Melin and the Sveen children filed competing claims. Pet. App. 10a. The District Court applied Minnesota's statute and awarded the proceeds to the Sveens. Pet. App. 16a. The Eighth Circuit reversed. It explained that applying the statute would impair the obligation MetLife owed to Sveen by "disrupting [his] expectations" and "right to rely on the law ... as it existed when the contracts were made." Pet. App. 5a–6a.

SUMMARY OF ARGUMENT

I. By its terms, the Contracts Clause is absolute: it forbids *any* state law that impairs the obligations of contracts. Moreover, the same purposes that animated the clause in 1787—ensuring people can rely on their contracts, protecting against laws benefiting special interests, and promoting political stability—remain relevant today. Under current doctrine, however, courts regularly uphold laws that undermine this crucial protection.

The Court should restore the plain meaning and the original understanding of the clause. Under that standard, this case is straightforward. MetLife owed a contractual obligation to Sveen, yet Minnesota's law vitiated that obligation. Under the Framers' absolute Contracts Clause, the case ends there.

II. Even if the Court does not restore the original meaning of the Contracts Clause, it should at least treat public and private contracts equally by forbidding the impairment of private contracts when a "more moderate course would serve [the state's] purposes equally well." *U.S. Trust*, 431 U.S. at 30–31. The text does not distinguish between public and private contracts, and history shows that, if anything, private contracts deserve *greater* protection.

This Court has justified its disparate treatment on the grounds that laws impairing public contracts implicate the state's self-interest. But states are just as self-interested when they impair private contracts. For example, states often favor in-state interests over out-of-state ones, or the interests of politically powerful groups over unpopular ones.

If private impairments are scrutinized as thoroughly as public impairments, this case is again straightforward. Minnesota could have achieved its goal—protecting inattentive divorcés who forget to remove their former spouse as a beneficiary—in a host of less intrusive ways. It could, for example, do what Virginia does: require divorce decrees to prominently warn couples that the divorce may automatically revoke beneficiary designations. Or it could require the judge to confirm that divorcing couples have reviewed their policies. These approaches serve Minnesota's purported interest of realizing the policyholder's intent, but do not impair contracts.

III. Even under the Court's current approach, Minnesota's law is unconstitutional.

A. The statute substantially impairs the contractual obligation MetLife owed Sveen. Providing for the designated beneficiary is the whole point of a life-insurance policy. By changing this key term, Minnesota's law severely impaired Sveen's contract.

Petitioners' contrary arguments are meritless. Petitioners' novel claim that laws regarding divorce do not even implicate the Contracts Clause cannot be right; otherwise, states could void mortgages of divorcing couples or overrule prenuptial agreements upon divorce. This Court has never suggested states have such carte blanche to impair contracts.

Petitioners next argue that revocation-upon-divorce laws do not impair contracts because they affect only the "donative" part of a life-insurance agreement, not the "contractual" part. There is no such distinction. An insurance contract payable to a third party is a classic third-party beneficiary con-

tract, subject to all the normal rules of contracts. That is why a breach-of-contract claim is available against an insurance company that pays the wrong person. Indeed, if Petitioners were right, the Contracts Clause would not stop a state from making *itself* the beneficiary of all life-insurance contracts.

Finally, Petitioners claim that revocation-upon-divorce statutes are merely default rules, and that the "statutory requirement of filing a document does not unconstitutionally impair contractual obligations." Pet. Br. 47. Again, this sweeps too far. If true, it would allow states to alter *irrevocable* beneficiary designations for failure to file a form, without even triggering Contracts Clause scrutiny. Moreover, this categorical rule finds no basis in this Court's cases, which have turned on context in assessing whether such a requirement violates the clause. Here, that context shows why revocation-upon-divorce laws impose a substantial impairment. These laws are *premised* on the idea that policyholders don't think about their beneficiary designations. If so, the legislature can't expect those same individuals to know that the law has changed and exercise their theoretical right to re-designate their former beneficiary.

B. Minnesota's law does not further a significant and legitimate purpose. It does not attempt to remedy a broad, well-documented social problem in a way that merely incidentally affects contractual obligations. Instead, it specifically rewrites a small group of contracts out of a desire to help policyholders who, it is assumed, would have wanted to change their beneficiary designations. But that assumption is often wrong, and as a result significantly impairs the contracts of those who wish to keep

their ex-spouse as beneficiary. Given the cost Minnesota's law imposes on such policyholders and the absence of any real evidence of offsetting benefits, Minnesota's law does not serve a significant and legitimate public interest.

C. Finally, Minnesota's law is not an appropriate means of achieving Minnesota's purposes. Many policyholders wish to leave their former spouse as their beneficiary, which is why almost half of the states and the federal government do not automatically revoke beneficiary designations upon divorce. Minnesota, however, revokes these designations even where the law at the time they signed their contract provided otherwise. There is no reason to harm these policyholders—who are presumed not to be paying attention—simply to benefit others who might have wished to change their designation. Indeed, the plethora of ways Minnesota could have helped any such individual confirms that retroactively revoking beneficiary designations is not reasonable.

ARGUMENT

I. Retroactively Applying Minnesota's Statute Contravenes the Contracts Clause's Original Meaning

The Contracts Clause means what it says: states may not pass laws impairing the obligations of contracts. This Court should restore that original meaning, not only because the Constitution's text and structure require it, but also to protect the important interests the clause once shielded. Because Minnesota's statute impairs the obligation MetLife

owed to Sveen, it violates the Contracts Clause as originally, and properly, understood.

1. The Contracts Clause is just eleven words long: "No State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. Yet "it would seem difficult to substitute words which are more intelligible, or less liable to misconstruction," than its brief categorical prohibition. *Sturges*, 17 U.S. (4 Wheat.) at 197. As this Court has repeatedly recognized, "the language of the Contract Clause appears unambiguously absolute," *Allied Structural*, 438 U.S. at 240, and "appears literally to proscribe 'any' impairment," *U.S. Trust*, 431 U.S. at 20. This straightforward language creates a "plain guarantee," not a conditional protection that courts may "balanc[e] away." *El Paso*, 379 U.S. at 517 (Black, J., dissenting).

The Constitution's structure reinforces the point. Section 10's first clause provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

These are robust prohibitions, important enough to be called "the soul of the Constitution." 4 Elliot, *supra*, at 333. To this day, the Constitution forbids all ex post facto laws, bills of attainder, and titles of nobility, no matter how "reasonable" they might be. *See, e.g.*, *Stogner* v. *California*, 539 U.S. 607, 611

(2003) (Ex Post Facto Clause); *United States* v. *Lovett*, 328 U.S. 303, 315 (1946) (Bill of Attainder Clause). The Contracts Clause's presence in this list confirms its own absolute nature.

The presence of express exceptions to limitations on state power in section 10's second and third clauses highlights the absence of any exceptions to the Contracts Clause. For example, states may lay imposts where "absolutely necessary" or may "engage in war" if "actually invaded." U.S. Const. art. I, § 10, cls. 2–3. Unlike section 10's first clause, moreover, its second and third clauses provide blanket permission for actions taken with "the Consent of Congress." *Id.* The Framers thus knew how to craft exceptions to limitations on state power. The Contracts Clause has none.

These textual points make clear what *Blaisdell* all but admitted: modern jurisprudence "has rewritten the contract clause by inserting the word 'unreasonably' before 'impairing' and adopting a radically undemanding definition of 'reasonableness.'" *Chicago Bd. of Realtors*, 819 F.2d at 743 (opinion of Posner and Easterbrook, JJ.). Rather than "confine[]" itself "to the interpretation which the framers ... would have placed upon" the clause, or give effect to its "associat[ion] in the same section with other and more specific prohibitions," the Court struck its own "rational compromise between individual rights and public welfare" in light of its "growing appreciation of public needs." *Blaisdell*, 290 U.S. at 427, 442–443. The Constitution's words deserve better.

2. Recognizing the Contracts Clause's absolute nature is consistent with its purposes. The Contracts Clause was designed to protect the rule of law, minimalize factionalism, and promote political stability. Those reasons remain as important today as in 1787, yet current doctrine leads courts to bless laws that exhibit the very dangers the clause was supposed to prevent.

Consider first the rule of law. To obey the law, people must know what it is, which requires that it be "general, prospective, and relatively stable." Kmiec & McGinnis, *supra*, 14 Hastings Const. L.Q. at 527. As Justice Story reasoned, "retrospective laws are, indeed, generally unjust." 2 J. Story, Commentaries of the Constitution § 1398 (5th ed. 1891). Early decisions interpreting the Contracts Clause thus consistently struck down laws that undermined the stability of pre-existing agreements—public or private—because laws must be stable to be known. *Supra* 3–6. Indeed, Justice Johnson went so far as to deem this "a principle which will impose laws even on the deity." *Fletcher*, 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring).

The rewritten Contracts Clause's balancing tests do little to help people know whether their contracts will be enforced. Experience in the courts of appeals confirms as much. The Third Circuit, for example, upheld a law granting senior citizens the right to continue living in an apartment for *forty years*, with rent controls, after the unit's conversion to a condominium, despite pre-existing leases. *Troy Ltd.* v. *Renna*, 727 F.2d 287, 290, 297–98 (3d Cir. 1984). Notwithstanding the obvious importance of predictable rules in real estate markets, the court conclud-

ed that the law did not *substantially* impair contracts because the aged tenants were unlikely to live out the forty years.

Apartment owners aren't the only ones to have the contractual rug pulled out from under them. For instance, Chrysler's contracts forbade its dealers from changing location without Chrysler's permission. Years later, Wisconsin allowed dealers to "challenge a manufacturer's refusal to permit him to move his dealership" before a state agency. *Chrysler Corp.* v. *Kolosso Auto Sales, Inc.*, 148 F.3d 892, 893, 897 (7th Cir. 1998). The court ruled that change insubstantial because it thought the parties could have foreseen it. Governments have also unilaterally modified public contracts—including those covering police officers, firefighters, and teachers—despite those contracts' supposedly greater protection. *See, e.g., United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union* v. *Fortuno*, 633 F.3d 37, 46–47 (1st Cir. 2011); *Buffalo Teachers Fed'n* v. *Tobe*, 464 F.3d 362, 371 (2d Cir. 2006).

Worse, courts frequently divide on whether similar laws violate the ersatz Contracts Clause, making it even more difficult to know one's rights. Take just the examples above: other courts have struck down laws altering landlord-tenant contracts, *e.g., Anthony* v. *Kualoa Ranch, Inc.*, 736 P.2d 55, 63 (Haw. 1987) (requiring landlords to pay tenants for improvements), voided laws altering franchise contracts, *e.g., Equip. Mfrs. Inst.* v. *Janklow*, 300 F.3d 842, 862 (8th Cir. 2002), and invalidated wage freezes for state employees, *e.g., Univ. of Hawaii Prof'l Assembly* v. *Cayetano*, 183 F.3d 1096, 1107 (9th Cir.

1999). This hardly inspires confidence in the rule of law.

Second, the Contracts Clause was designed to prevent the singling out of disfavored groups, including creditors. Because the Framers recognized that state legislatures were highly susceptible to such pressures, *see* Federalist No. 10 (Madison), they enacted the Contracts Clause to prevent state-level majorities from "redistributing resources between parties to a contract by voiding obligations" in favor of the group du jour. Kmiec & McGinnis, *supra*, 14 Hastings Const. L. Q. at 529.

Once again, however, the modern Contracts Clause allows just that. The examples just discussed demonstrate this phenomenon. Additional examples abound. The Seventh Circuit, for instance, upheld a law that, among other things, required landlords to accept subleases and shifted the responsibility for repairs from the tenant to the landlord. *Chicago Bd. of Realtors,* 819 F.2d at 737. And landlords aren't the only targets of this redistributivist impulse. Berkeley required employers operating on land leased from the city to pay a "living wage," *RUI One Corp.* v. *Berkeley*, 371 F.3d 1137, 1143 (9th Cir. 2004), effectively inserting a new term requiring the lessee to pay higher wages, *id.* at 1158 (Bybee, J., dissenting). The Ninth Circuit upheld that law even though it applied retroactively and targeted a very small number of employers. *Id.* at 1150–54 (majority opinion). The Supreme Court of Montana upheld an increased homestead exemption to prior debts, despite previously holding precisely the opposite. *Neel* v. *First Fed. Sav. & Loan Ass'n*, 675 P.2d 96, 103–06 (Mont. 1984). And the Oklahoma Supreme Court

upheld the so-called Sweetheart Gas Act, which gave a share of gas revenues to each co-owner of the property, no matter what their royalty clauses said about the matter. *Seal* v. *Corp. Comm'n*, 725 P.2d 278, 292 (Okla. 1986).

While courts upheld these laws under different prongs of the current test, each is an example of a legislature benefiting a favored class. Each would have been struck down under the original understanding for that very reason. *E.g.*, *Gunn*, 82 U.S. (15 Wall.) at 622–23 (law increasing homestead exemption); *Champion & Dickason* (unreported) (law extending the time for a politically connected debtor to pay his debts). Modern doctrine thus does little to prevent the sort of legislative capture the clause was designed to guard against.

Third, the Contracts Clause protected against abrupt changes in policy; in many ways, only once existing contracts had been completed could a legislature effect policy changes. As Madison wrote, "stability in government is essential to national character," and it is "among the chief blessings of civil society." Federalist No. 37.

The watered-down Contracts Clause provides no emergency brake. "Even big, totally unpredictable impairments ... can survive challenge ... if they are responsive to economic emergencies." *Chrysler*, 148 F.3d at 896; *see, e.g.*, *Borman, LLC* v. *18718 Borman, LLC*, 777 F.3d 816, 820 (6th Cir. 2015) (upholding law that "render[ed] solvency covenants in nonrecourse loans unenforceable" in light of the 2008 recession). Indeed, significant impairments often survive even when they serve "considerably less exigent

needs." *Chrysler*, 148 F.3d at 896. For example, budget shortfalls have often justified freezing wages, and the desire to level the playing field between renters and landlords has often led to severely impaired leases.

The Court should return to the original understanding of the Contracts Clause. That interpretation best reflects the Constitution's text and structure. And the same concerns that animated the clause at the Founding exist today. Whenever a state law impairs the obligation of contract, it must be set aside.

3. *Stare decisis* does not stand in the way of correcting *Blaisdell*'s errors. To begin, *stare decisis* is "not an inexorable command," and it is "at its weakest" in constitutional cases. *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997).

There are ample reasons to jettison *Blaisdell*. For one, as demonstrated above, *Blaisdell* was not well reasoned when decided. It also has not proven workable since, because parties to contracts cannot predict whether a state will attempt to override their agreement or whether a court will uphold the law. *Supra* 21–23. And there's no reason to think legislatures are going to restrain themselves in the future. You don't leave the henhouse walls down in hopes that the foxes will let the chickens be.

Finally, it would be more than ironic to keep *Blaisdell* alive on reliance grounds. The absolutist understanding fosters certainty by "giving permanence and security to contracts." *Dartmouth College*, 17 U.S. (4 Wheat.) at 647–48. *Blaisdell*'s squishy approach, by contrast, leaves everyone at

sea. It would be passing strange to entrench precedent that undermines the integrity of every contract because, somehow, someone somewhere might have relied upon modern doctrine's ambiguity. In this same vein, it does not matter that "legislatures may have enacted" laws impairing contracts "believing those [laws] were constitutional." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010). Those laws would still apply prospectively—where they do not upset the parties' expectations—and the mere existence of imperiled legislation cannot outweigh every other consideration. If it could, "legislative acts could prevent [the Court] from overruling [its] own precedents, thereby interfering with [its] duty to say what the law is." *Id.*

4. The true Contracts Clause requires striking down Minnesota's law as applied. There is no doubt the law impairs the contractual obligation MetLife owed to Sveen. The contract was simple, but important. Sveen was required to pay MetLife premiums; in exchange, MetLife was obligated to pay death benefits to the person Sveen chose. Sveen followed the steps laid out in the contract and chose his then-wife Melin. Minnesota cannot change that designation without impairing that contract. *See infra* 33–36. Whether or not MetLife cares who gets the check, Sveen certainly did, as all policyholders do; after all, the whole point of a life-insurance contract is that the company will pay the beneficiary of the policyholder's choice.

Under the proper understanding of the Contracts Clause, that should end this case. The Framers' absolute bar means Minnesota may not impair

Sveen's life-insurance contract by shifting the legal background in this fashion, no matter its reasons.

II. Laws Impairing Private and Public Contracts Should Be Treated Alike

Even if the Court does not return to the clause's original meaning, this case calls for a more modest step: putting public and private contracts on equal footing. As with public contracts, a state should "not [be] completely free to consider impairing the obligations of [private] contracts on a par with other policy alternatives." *U.S. Trust*, 431 U.S. at 30–31. Instead, it should take the "more moderate course" that avoids impairing contracts while still serving the state's "purposes equally well." *Id.* at 31.

1. Even *Blaisdell* acknowledged that "whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power." 290 U.S. at 439. That principle requires that a state not only establish a legitimate public purpose, but also pursue it by means that avoid or at least mitigate the impairment of contracts. The Court already uses this approach for public contracts, where states are not "free to consider impairing" their obligations when more moderate steps would achieve their goals. *U.S. Trust*, 431 U.S. at 30–31.

This principle often prevents the impairment of public contracts. For example, courts routinely strike down pay freezes for public employees because "although perhaps politically more difficult, numerous other alternatives ... would more effectively and equitably raise revenues," including increasing taxes and tightening the budget. *Cayetano*,

183 F.3d at 1107. Therefore, to renege on its financial commitment, the state "must demonstrate that the funds are available from no other possible reasonable source." *Chiles* v. *United Faculty of Florida*, 615 So. 2d 671, 673 (Fla. 1993) (applying *U.S. Trust*'s principles under the state constitution). Even if other choices are not "as politically feasible," "the State cannot resort to contract violations to solve its financial problems." *Op. of the Justices (Furlough)*, 609 A.2d 1204, 1211 (N.H. 1992).

When it comes to "economic and social regulation" that impairs private contracts, however, courts today "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves*, 459 U.S. at 412–13; *see, e.g.*, *Keystone Bituminous Coal Ass'n*, 480 U.S. at 506 ("refus[ing] to second-guess" the legislature).

This level of deference is unwarranted. Nothing about the Contracts Clause suggests that impairments of private contracts should be reviewed more leniently. The text draws no distinction between public and private agreements. And history suggests that, to the extent different treatment is warranted, private contracts merit *greater* protection. The Framers included the clause's strong prohibition against the backdrop of debtor-relief laws that impaired private contracts. Of particular concern were laws that threatened the development of a national economy by disfavoring out-of-state interests. *See, e.g.*, Federalist No. 7 (Hamilton). In other words, the Framers drafted the Contracts Clause precisely *because* they did not trust state legislatures to exercise "legislative judgment as to the necessity and reasonableness of a particular measure"

even—indeed, especially—when private contacts were at stake.

"For roughly the first 150 years of our constitutional history," courts followed the Framers' lead: "the contract clause was viewed as imposing greater restraints on impairments of private rather than public contracts." Merrill, *supra*, 37 Case W. Res. L. Rev. at 599. For instance, in contrast to private contracts, courts construed public contracts strictly in favor of the government, thereby giving legislatures greater freedom from their predecessors' prior choices. *E.g.*, *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

Contemporary doctrine, however, has turned the clause on its head, and for no good reason. *U.S. Trust* posits that a stronger check on impairments of public contracts is necessary "because the State's self-interest is at stake." 431 U.S. at 26. But the state must have a "legitimate public purpose" *whenever* it substantially impairs contractual obligations, public or private. *Id.* at 22. True, a state may be "self-interested" when it seeks to break its own promises. But it is just as "self-interested" when it pursues a "legitimate public purpose" by permitting others to break theirs.

This is most obvious where, as Hamilton feared, states impair private contractual obligations to disfavor out-of-state interests. For example, states have enacted laws that retroactively altered contracts to benefit in-state distributors at the expense of out-of-state manufacturers. Nowadays, such laws are routinely upheld against Contracts Clause challenge. *E.g.*, *All. of Auto. Mfrs.* v. *Gwadosky*, 430

F.3d 30, 42 (1st Cir. 2005); *Chrysler*, 148 F.3d 892; *Schieffelin & Co.* v. *Dep't of Liquor Control*, 479 A.2d 1191, 1197–98, 1202 (Conn. 1984) (law was "quite frankly" designed to benefit Connecticut businesses against "out-of-state manufacturer[s]"). The "self-interest" in favoring in-state constituents is just as pernicious as the self-interest that worried the *U.S. Trust* Court.

Similar worries arise within states as well. No less than Congress, a state legislature "is a 'they,' not an 'it.'" Kenneth A. Shepsle, *Congress Is a "They" Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239, 244 (1992). Legislators have "disparate interests and represent[] persons having disparate interests." Merrill, *supra*, 37 Case W. Res. L. Rev. at 616. Thus, state legislatures—that is, legislators wielding majority power—can be expected to impair contracts to benefit one group over another. Here, too, examples abound. Judges Posner and Easterbrook explained how a law "rewrit[ing] present ... leases of apartments in Chicago"—by requiring interest on security deposits, insisting that the deposits be held in Illinois banks, and so on—was "an unedifying example of class legislation and economic protectionism rolled into one." *Chicago Bd. of Realtors*, 819 F.2d at 741–742 (opinion of Posner and Easterbrook, JJ.); *see also Borman*, 777 F.3d at 820.

In short, it makes no sense to review laws impairing private obligations more leniently: the text admits no such distinction, history cuts in precisely the opposite direction, and purpose demands equal scrutiny for both. Thus, where an "evident and more moderate course" than impairing private contracts would serve states' "purposes equally well,"

U.S. Trust, 431 U.S. at 31, this Court should demand states take that course instead.

2. When it comes to revocation-upon-divorce statutes, there are more moderate courses that would serve states' purposes equally well. In other words, "the means chosen by [Minnesota] are, quite obviously, in no way 'necessary' to the achievement of the stated goals." *Ass'n of Surrogates & Supreme Court Reporters Within City of New York* v. *New York*, 940 F.2d 766, 773 (2d Cir. 1991).

Petitioners justify Minnesota's law as a protection for inattentive divorcés—those who want to change their beneficiary after a divorce but fail to realize they need to do so. Pet. Br. 56–57. But for the reasons discussed, it is "certainly not a universal truth" that divorcés *want* to change their designations, *Whirlpool*, 929 F.2d at 1323; many intentionally leave them as-is, *supra* 11–13, and others would do so if they considered the question. These categorical laws thus benefit one set of policyholders at the expense of another: they alter life-insurance contracts to benefit those who would have made the switch but failed to complete the requisite paperwork, while hurting those who did not want (or would not have wanted) such a change.

There are, however, at least two ways Minnesota could help those who wanted to alter their designations without impairing the contracts of those who did not. In Virginia, which has a revocation-upon-divorce statute, a divorce decree must prominently give notice that divorce may or may not automatically revoke beneficiary designations. Va. Code § 20-111.1(E). This "conspicuous, bold print" warn-

ing must inform the divorcing couple: "If a party intends to revoke any beneficiary designation made payable to a former spouse following the annulment or divorce, the party is responsible for following any and all instructions to change such beneficiary designation given by the provider of the death benefit." *Id.* This alternative approach does not impair the obligation of life-insurance contracts, but still ensures the policyholder thinks anew about who the beneficiary should be. If Minnesota wishes to nullify beneficiary designations upon divorce, it should at least warn the divorcing couple. If it had warned Sveen, he could have re-designated Melin, as she insists he promised.

Minnesota also has other, equally feasible alternatives. It could require divorce courts to confirm that divorcing couples have reviewed their life-insurance policies, if any. *See* Utah Code § 30-3-5(1)(e)(i). After that, courts could confirm that the listed beneficiary accurately reflects policyholder intent. *Id.* § 30-3-5(1)(e)(ii). Such an approach would not impair the insurance company's obligation, because it would not automatically change the beneficiary designation. But it *would* serve the purpose behind Minnesota's law, by ensuring that divorcing couples addressed any desired change to their beneficiary designations during the divorce itself. Minnesota never provided Melin and Sveen with this information.

If this Court treats laws that impair private contracts the same as those that impair public contracts—as it should—then these two more moderate approaches establish the unconstitutionality of Minnesota's current regime: it impairs the obliga-

tion of contracts even though readily available solutions would have equally served its interests without infringing anyone's contractual rights.

III. Minnesota's Law Violates the Contracts Clause as Currently Understood

Even this Court's modern Contracts Clause test precludes retroactive application of Minnesota's law. That test has three aspects: if the law in question works a "substantial impairment of a contractual relationship," it must serve "a significant and legitimate public purpose," and its "adjustment of the rights and responsibilities of contracting parties [must be] based upon reasonable conditions ... of a character appropriate to the public purpose justifying [the law's] adoption." *Allied Structural*, 438 U.S. at 244; *Energy Reserves*, 459 U.S. at 411–12. Minnesota's law fails every step.

A. The Statute Substantially Impairs Contracts

The first step in modern Contract Clause analysis is determining whether a law "operate[s] as a substantial impairment of a contractual relationship." *Allied Structural*, 438 U.S. at 244. Retroactive application of Minnesota's statute substantially impairs life-insurance contracts because it changes the key term of the contract: who gets paid. Nothing Petitioners say in response changes that fact.

1. Automatically erasing the beneficiary from a life-insurance contract is a substantial impairment

"The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the pro-

tection of private contracts." *Allied Structural*, 438 U.S. at 245. They recognized that "contracts enable individuals to order their personal and business affairs according to their particular needs and interests." *Id.* That ordering is upset not just when subsequent law completely eliminates the obligation, but also when it materially alters the terms of the parties' deal. Thus, "total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves*, 459 U.S. at 411. Instead, when a law impairs a key contractual provision—especially one that induced the party to sign the contract—it works a substantial impairment. *Allied Structural*, 438 U.S. at 243 n.14.

Allied Structural puts these principles into practice. Allied Structural's employment contracts included a pension benefit. Ten years after the company formed the pension plan, a Minnesota law "substantially altered [the] relationships" between the employer and employees "by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake." *Id.* at 240. In particular, "the company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan." *Id.* at 246. Thus, "a basic term of the pension contract ... was substantially modified." *Id.*

Similarly, "the contractual impairment effected" by application of a revocation-upon-divorce law to an existing life-insurance policy is "severe, virtually total." *Parsonese* v. *Midland Nat'l Ins. Co.*, 706 A.2d 814, 818 (Pa. 1998). Nobody buys life insur-

ance just so the insurance company will pay someone chosen from the phonebook; rather, "selection of a beneficiary is the entire point" of the contract. *Id.*

Both Congress and this Court have recognized as much. In the context of federal laws governing life-insurance policies, this Court has repeatedly struck down state court judgments purporting to alter the contractually chosen beneficiary. In *Wissner* v. *Wissner*, for example, an insured named his parents as beneficiaries pursuant to the National Service Life Insurance Act of 1940. 338 U.S. 655, 656–57 (1950). A California court, however, held that the proceeds were community property and awarded a portion to the policyholder's widow. This Court reversed, finding "the judgment below nullifie[d] the soldier's choice and frustrate[d] the deliberate purpose of Congress." *Id.* at 659. The Court explained that the guarantee that the policy would be "payable to the relative of his choice" was the serviceman's "guarantee of the complete and full performance of the contract to the exclusion of conflicting claims." *Id.* at 660.

This Court reaffirmed this principle in *Hillman* v. *Maretta*, 569 U.S. 483. Hillman named his then-wife, Maretta, as the beneficiary of his FEGLIA-governed policy. They divorced and Hillman remarried. After Hillman's death, Maretta collected the benefits. By state statute, however, the divorce had automatically revoked Hillman's beneficiary designation. The statute also provided that if the revocation provision were preempted, the ex-spouse would be liable in damages to the party who would

have received the proceeds had the revocation provision been effective. *Id.* at 486–90.

Everyone agreed that federal law preempted the revocation provision, *id.* at 489, but the Court held that the liability provision was also preempted: it "interfere[d] with Congress' scheme" by "direct[ing] that the proceeds actually belong to someone other than the named beneficiary," *id.* at 494. Just as in *Wissner*, the payment of the insurance benefits to the designated beneficiary was a "guarantee of the complete and full performance *of the contract*." *Id.* at 495 (emphasis added). "With that promise comes the expectation that the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them." *Id.*

The same is true here. When Sveen purchased his life-insurance policy, MetLife contractually agreed to pay death benefits to the person he designated in accordance with the policy's terms. He designated Melin. Pet. App. 2a. Under Minnesota's law at the time, divorce had no effect on such beneficiary designations. *Larsen*, 463 N.W.2d at 779. But now, Minnesota seeks to erase Melin as the beneficiary, changing the contract's key term. Minn. Stat. § 524.2-804. Retroactive application of Minnesota's statute thus "substantially impairs [the] contract[]," "fundamental[ly]" "chang[ing] the very essence" of the agreement. *Whirlpool*, 929 F.2d at 1322.

2. Petitioners' counterarguments are wrong

1. Petitioners' attempts to resist this straightforward conclusion lack merit. They first contend

that the Contracts Clause simply does not apply when a state acts in the realm of divorce. Pet. Br. 17–28. This is a notably novel claim. Petitioners insisted that "the arguments on both sides of the issue" in this case have been "fully aired." Pet. 17. Yet Petitioners made no mention of this argument until their opening merits brief *in this Court*, and cite no court that has ever discussed the argument, let alone relied upon it, in upholding a revocation-upon-divorce statute. Petitioners' sweeping, untested claim has no place in a case that could define the limits of state power. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is a "court of review, not first view").

Petitioners' argument also fails on the merits. As an initial matter, this Court has enforced other constitutional rights even when the states' traditional role in marriage and divorce was in play. *See, e.g.*, *Williams* v. *North Carolina*, 317 U.S. 287, 303 (1942). Why single out the Contracts Clause for disfavor?

Moreover, Petitioners' argument proves too much. If states' power over divorce rendered the Contracts Clause irrelevant, a state could impose an automatic two-year moratorium on mortgage payments upon divorce, giving each side a fresh start. Indeed, Petitioners' argument can't be right even for contracts *between the divorcing parties concerning the division of their assets*. States have long enforced prenuptial agreements. *See McKee-Johnson* v. *Johnson*, 444 N.W.2d 259, 265 (Minn. 1989), *overruled in part on other grounds by In re Kinney*, 733 N.W.2d 118 (Minn. 2007). But if Petitioners were right, states could change the rules governing such

agreements at will without violating the Contracts Clause. No one thinks that is right. The Uniform Premarital Agreement Act, for instance, applies only prospectively. Uniform Premarital Agreement Act § 12 (1983). And when Maine omitted that limitation from its own law, the state supreme court indicated that retroactive application would violate the state's similarly worded Contracts Clause. *Hoag* v. *Dick*, 799 A.2d 391, 393 (Me. 2002).

Nor do this Court's cases support Petitioners' categorical view. As Petitioners concede, Pet. Br. 24–25, *Maynard* v. *Hill* held simply that the Contracts Clause does not restrict the legislature's ability to grant a divorce. 125 U.S. 190 (1888). But that is because "marriage is not a contract within the meaning of" the Contracts Clause, *id.* at 210, and therefore a legislature is free to terminate a marriage or set the conditions on which a divorce can be granted. It does not follow that the legislature can amend other, *real* contracts between a divorcing party and a third party, or between the divorcing parties themselves.

Petitioners similarly argue that because divorce courts "have broad powers to distribute property" and can even "force a divorcing spouse to maintain his ex-spouse as a life insurance beneficiary," legislatures must be able to impair contracts, too. Pet. Br. 21. That does not follow. "It has been settled by a long line of decisions" that the Contracts Clause "is directed only against impairment by legislation and not by judgments of courts." *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 451 (1924) (citing nineteen cases). Like the provisions surrounding it, the Contracts Clause targets "Law[s]"—that is, legislative

enactments. U.S. Const. art. I, § 10, cl. 1; *see Rogers* v. *Tennessee*, 532 U.S. 451, 458–60 (2001) (Ex Post Facto Clause does not apply to courts).

It could hardly be otherwise. Courts have long had the "power to reform written contracts for fraud or mistake," *Ivinson* v. *Hutton*, 98 U.S. 79, 82 (1878), to consider claims that contracts were "void ab initio," *PHL Variable Ins. Co.* v. *Bank of Utah*, 780 F.3d 863 (8th Cir. 2015), and to "rescind the contract," *Brashier* v. *Gratz*, 19 U.S. (6 Wheat.) 528, 534 (1821), among other things. If judgments came within the clause's orbit, "every case decided in a state court could be brought [to the Supreme Court], where the party setting up a contract [could] allege[] that the court had taken a different view of its obligation to that which he held." *Knox* v. *Exch. Bank*, 79 U.S. (12 Wall.) 379, 383 (1871). The Framers did not displace state courts' authority over contracts in this manner.

Petitioners further suggest that revocation-upon-divorce statutes merely provide a default rule for construing divorce decrees. Pet. Br. 21. To begin, no reasonable English speaker would describe this situation—treating silence in a divorce decree as revoking beneficiary designations—as "construing" a decree rather than rewriting it. Indeed, revocation-upon-divorce statutes themselves do not speak in such terms. They purport to operate on the life-insurance contract *itself* upon the divorce, *see* Minn. Stat. § 524.2-804, subd. 2, establishing the consequences of that divorce rather than dictating the interpretation of the decree. For this reason, a legislative divorce would revoke beneficiary designa-

tions under the statute, even with no court order to construe.

Moreover, Petitioners' interpretation raises Full Faith and Credit concerns when the divorce occurred in a different state. That provision requires a state to give "Full Faith and Credit" to judgments entered by sister states' courts. U.S. Const. art. IV, § 1; *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222, 233–34 (1998). States may not disregard sister-state judgments on public policy grounds. *Baker*, 522 U.S. at 233. That rule cannot be evaded by purporting to "interpret" the sister state's judgment to mean something it does not say. If, for example, a Minnesota decedent had previously been divorced in California, Petitioners' theory would have the Minnesota legislature directing the interpretation of a California judgment to revoke the decedent's beneficiary designation, even though the California judgment says no such thing—indeed, even though California law *rejects* that consequence for life-insurance contracts. Cal. Prob. Code § 5040(e).

2. Turning to the Contracts Clause analysis, Petitioners contend, Pet. Br. 29–38, that beneficiary designations should not be treated as contractual. Following the lead of the Joint Editorial Board for the Uniform Probate Code, Petitioners divide life-insurance policies into two supposed halves: (1) a contractual component, which guarantees payment, and (2) a donative transfer component, which identifies the payment's recipient. On this theory, because Minnesota's law affects only the second component, it impairs no contractual obligation. *See Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as*

Applied to Pre-Existing Documents, 17 Am. College Trust & Est. Couns. 184 (1991) (*JEB Statement*).

Not even a lawyer could love that supposed distinction. "A policy of insurance is nothing more nor less than a contract wherein an insurance company, for valuable consideration, agrees to pay a sum of money ... *to a designated person* called a beneficiary." *Ping* v. *Denton*, 562 S.W.2d 314, 316 (Ky. 1978) (emphasis added). "When the proceeds of an insurance policy are made payable to a third person, a third-party beneficiary contract exists." 16 *Williston on Contracts* § 49:4 (4th ed.). The terms of the contract give the policyholder "a *contractual* right to have [the insurance company] pay death benefits to the beneficiary designated by him," and the insurance company "a corresponding *contractual* obligation to pay death benefits to the surviving beneficiary so designated." *Aetna Life Ins. Co.* v. *Schilling*, 616 N.E.2d 893, 895 (Ohio 1993) (emphasis added).

The requirement to pay the beneficiary the policyholder names is thus just as contractual as the requirement to pay the money. That is why a breach-of-contract claim against an insurance company for mistakenly paying the wrong person is viable. *See, e.g., Alexander* v. *Prudential Ins. Co.*, 292 N.W. 475, 476–77 (Mich. 1940). Sveen's own contract confirms the nature of the obligation: to pay proceeds to the beneficiary the policyholder selects in accordance with the contract. *See* Dist. Ct. Dkt. #52-2 at 3 (specifying Respondent as beneficiary); *id.* at 6, 18 (specifying the procedures required to change the beneficiary).

This Court, too, has understood the contractual nature of this obligation. The statute in *Hillman* specified that "the provisions of any contract under [this statute] which relate to the nature or extent of coverage or benefits ... shall ... preempt any law of any State ..., which relates to group life insurance to the extent that the law ... is inconsistent with the *contractual* provisions." 5 U.S.C. § 8709(d) (emphasis added). By holding that revocation-upon-divorce statutes were preempted, this Court recognized that the obligation to pay a specific beneficiary is contractual. *Hillman*, 569 U.S. at 493–95.

Given the near-universal understanding that the obligation to pay a specific person is contractual, it is no wonder Petitioners find little support for their contrary understanding. Indeed, the wellspring for this bifurcation, the JEB Statement, cited no authority for its assertion. 17 Am. College Trust & Est. Couns. at 184–85.

Finally, Petitioners' contractual-donative divide proves too much. On their view, the Contracts Clause would be no obstacle to a state statute that revokes all beneficiary designations and requires that insurance companies pay all policy proceeds to the first person who files a claim, to the state treasury, or to anyone else the legislature chooses; after all, such laws would apply only to the "donative transfer" component of the contract. Petitioners *accept* this consequence of their theory, but insist that, while it "perhaps" might raise "concerns under other constitutional provisions," it raises none "under the Contracts Clause." Reply to Pet. for Cert. 9–10. It is remarkable to claim that the *Contracts Clause* has nothing to say about chang-

ing *the key provision in a contract*, even if Petitioners think doing so might "perhaps" run afoul of some other, unnamed constitutional provision.

3. Petitioners next protest that if beneficiary designations are contractual, the insurance company's obligation is not actually to pay according to the contract, but to pay "the beneficiary under state law—whomever that beneficiary may be," or, if there is uncertainty, to interplead. Pet. Br. 30–32.

That is not what Sveen's contract says, or what any life-insurance contract says. Sveen didn't buy insurance so that MetLife would pay whomever Minnesota chose. Nor did he buy life insurance so that MetLife would interplead, as interpleader is simply the method by which an unclear obligation is determined, *see* 7 Charles Alan Wright et al., Federal Practice and Procedure § 1702 (3d ed.). Indeed, in this sense Petitioners' claim again proves too broad: if the insurance company need only pay in accordance with state law or interplead, the state could designate *itself* as the beneficiary without any Contracts Clause scrutiny.

Petitioners' claim must therefore be wrong. And it is easy to see how. Contracts "long have been regarded as including not only the express terms but also the ... state law pertaining to interpretation and enforcement." *U.S. Trust*, 431 U.S. at 19–20 n.17. But it is only "the laws which subsist *at the time and place of the making of a contract* ... [that] enter into and form a part of it." *Id.* at 20 n.17 (emphasis added). In other words, even if MetLife's duty were to pay in accordance with state law, the applicable law is the law in place when Sveen entered

the contract. Under that law, Melin gets the money. *See Larsen*, 463 N.W.2d at 779. By changing—indeed, reversing—that rule, the revocation-upon-divorce statute impairs the contract.

Petitioners' policy reasons for treating the insurance company's contractual obligations as non-contractual, Pet. Br. 32–38, are equally unpersuasive. They suggest there is no reason to treat beneficiary designations in contracts differently than those in wills. But even Petitioners concede that "an insurance policy is a contract under the Contracts Clause, and a will is not." Pet. Br. 33. There is nothing strange about treating a contract as a contract and a will as a will. So too for revocable trusts, *see* Pet. Br. 34–35: if they are contracts, then there is no reason to treat them like wills for Contracts Clause purposes.

Moreover, while Petitioners may believe there is no *functional* reason to treat beneficiary designations in different instruments differently, twenty-three states and the federal government disagree. This makes sense; life insurance serves different purposes than wills, and many former spouses want to retain their life-insurance beneficiary designations after divorce. *Supra* 11–13. Indeed, California and Missouri *have* nonprobate revocation statutes, but expressly exempt life insurance from them. Cal. Prob. Code § 5040(e); Mo. Rev. Stat. § 461.073(6).

Petitioners also argue that it would violate "principles of federalism" to apply the Contracts Clause here because doing so would prevent states from making other changes to their succession laws. Pet.

Br. 35–38. Not so. Under current law, a substantial impairment of contracts does not end the inquiry. If reforms to slayer statutes, adoption statutes, and statutory share statutes are as critical as Petitioners suggest, they will survive Contracts Clause challenges.

Indeed, these laws are all clearly tied to legitimate public interests. Slayer statutes further the public policy of not awarding a killer or abuser money. *See Prudential Ins. Co.* v. *Tull*, 690 F.2d 848, 849 (4th Cir. 1982) ("Federal law recognizes that the beneficiary's claim is barred by the equitable defense: 'No person should be permitted to profit from his own wrong.'"). Adoption statutes reflect the policy judgment that adopted children should be treated the same as biological ones. And statutory share laws reflect the policy judgment that widows and widowers should be taken care of upon their spouse's death. These sorts of laws are thus unlike revocation-upon-divorce statutes, whose narrow purpose is to effectuate an unexpressed intent of a party. Petitioners' examples might prevail at the second and third step of Contracts Clause analysis. *But see Bird Anderson* v. *BNY Mellon, N.A.*, 974 N.E.2d 21, 32–33 (Mass. 2012) (striking down adopted children statute as retroactively applied); *Matter of Estate of Gab*, 364 N.W.2d 924, 926 (S.D. 1985) ("To give the [statutory share law] any force retroactively would [unconstitutionally] impair the postnuptial agreement between decedent and appellant.").

In any event, that Petitioners have identified statutes that may justifiably impair contractual obligations does not change the fact of the impair-

ment. "Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution." *U.S. Trust*, 431 U.S. at 16. When a state changes the key term of a life-insurance policy, it impairs a contractual obligation.

4. Petitioners' supposedly independent argument that revocation-upon-divorce statutes merely construe divorce as an exercise of contractual rights, Pet. Br. 39–41, suffers from a similar flaw: it misapprehends the nature of MetLife's obligation. Petitioners correctly observe that where the policyholder changes the beneficiary, he is exercising a contractual right, not impairing an obligation. Pet. Br. 39–40. That is because the relevant obligation is to pay the proceeds to the beneficiary designated by the policyholder in accordance with the policy.

It is irrelevant that courts treat some actions as sufficient to change a beneficiary designation even absent strict compliance with contractual terms. For example, Minnesota courts have long allowed a procedurally improper beneficiary change where "there was intent to change the beneficiary by the insured" and "the insured acted affirmatively or otherwise did substantially all possible to show intention whether or not she complied with policy change of beneficiary provisions." *Larsen*, 463 N.W.2d at 780 (citing *Brown* v. *Agin*, 109 N.W.2d 147, 151 (Minn. 1961)). Petitioners suggest that "if a State enacted legislation codifying" such a rule, "the rule would not be retroactively *impairing* the policy." Pet. Br. 40.

If Petitioners mean to argue that legislatures may formalize existing doctrines, Respondent agrees; codifying a rule does not retroactively change *anything*. But if Petitioners mean to suggest that legislatures have free rein to provide "interpretive" guidance regardless of prior law, they must be mistaken. The "contemporaneous state law pertaining to interpretation enter[s] into and form[s] a part of" each contract as if it were "expressly referred to or incorporated in its terms." *U.S. Trust*, 431 U.S. at 19–20 n.17. By reversing the common-law rule—that divorce did *not* automatically revoke—Minnesota altered Sveen's contract just as surely as it would have had it passed a law "interpreting" every reference to "dollars" in that contract to mean Canadian ones. Thus, while states may prospectively treat divorce as presumptively revoking beneficiary designations, they may not impair existing obligations by changing the state law incorporated into pre-existing contracts.

5. Petitioners assert that even if revocation-upon-divorce statutes impair contractual obligations, they do not do so substantially because they are just default rules. Pet. Br. 44–49. Petitioners suggest that several cases upholding real-estate recording statutes or other similar laws establish a general rule that "a statutory requirement of filing a document does not unconstitutionally impair contractual obligations." Pet. Br. 47.

Petitioners' rule is sweeping. If Petitioners were right, revocation-upon-divorce statutes could reach even *irrevocable* beneficiary designations without Contracts Clause concern. States could require policyholders to annually file a document indicating

that they continue to want proceeds to be paid to the named beneficiary, rather than the state general fund or the governor's brother. Indeed, on Petitioners' view, the Contracts Clause would have nothing to say if a state passed a law allowing landlords to evict any tenant who failed to file a new, required form with the state. That is not the law.

In general, "courts do not presume acquiescence in the loss of fundamental rights." *Knox* v. *Serv. Emps. Int'l Union*, 567 U.S. 298, 312 (2012). That is why context always matters in determining whether a change constitutes a substantial impairment. A law like Minnesota's impairs a contract by overriding an express contractual term. It does not make the impairment any less substantial if the law affords the contracting parties a theoretical—but impracticable—way to restore their original contract rights.

As an initial matter, when a contract expressly provides the method by which a contractual right may be exercised, a state law altering that procedure generally impairs contractual obligations. For example, in *Seibert* v. *United States ex rel. Lewis*, a bond contract provided that taxes to pay bondholders would be collected the same way as other county taxes. 122 U.S. 284, 296–97 (1887). The legislature later passed a law requiring bondholders to initiate a suit in federal court and meet a number of other requirements to collect their payments, while allowing county taxes to be collected in a state-court action with far fewer requirements. Even though bondholders still had a way to collect payments owed to them, this Court found the law un-

constitutional because the contract provided the specific method by which the bond was to be paid; state law to the contrary thus impaired the contract. *Id.* at 297–98.

Moreover, giving some parties a mechanism for overcoming the legislature's change while leaving others in the lurch does not make the impairment insubstantial. For example, in *McGahey* v. *Virginia*, the Court struck down a law requiring bondholders with detachable bond coupons to produce the original bond from which the coupons were cut, or else lose the right to payment. 135 U.S. 685 (1890). Though there were probably coupon holders who could produce the original bond papers, the Court found that "in many cases" it was "impossible" to fulfill this condition. *Id.* at 694. Thus, the condition was "unreasonable," and the law had to go. *Id.*

Retroactive application of revocation-upon-divorce statutes runs headlong into these limits on state power. First, Sveen's contract (like every life-insurance contract) specifically provides the method by which a beneficiary may be designated and changed. Pet. App. 9a–10a. Divorce is *not* among them—under either the contract or the law in effect when Sveen purchased it. *See Larsen*, 463 N.W.2d at 779. Thus, as in *Seibert*, Minnesota's revocation-upon-divorce statute impairs Sveen's contract.

Second, while Minnesota's law allows a divorcé to restore the original beneficiary, the entire *premise* of Minnesota's law is that policyholders pay no attention to their beneficiary designations. "Having determined that some individuals are inattentive regarding their insurance policies, the ... legisla-

ture can hardly expect these same individuals to be cognizant of changes in the law respecting those policies." *Whirlpool*, 929 F.2d at 1323. Thus, in practice, the possibility of re-designating the original beneficiary is illusory for this class of policyholders, because many divorcés—on Petitioners' own assumption—are unaware of the need to update beneficiaries in the first place. Absent notice of Minnesota's re-designation of beneficiaries, expecting these inattentive divorcés to undo the impairment of their contractual rights is demanding the impossible. For them, Minnesota's so-called default rule "actually function[s] as [an] effective mandate[]." Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv. L. Rev. 1593, 1616 (2014). This case is thus akin to *McGahey*: Some coupon holders may have been able to find the original bond paper, but given the impracticality of that requirement for most, it impaired the contract. So too here.

The context in Petitioners' cases was quite different. In one, for instance, the party alleging an impairment had "actual notice," making it easy for him to comply with the requirement. *Gilfillan* v. *Union Canal Co. of Pennsylvania*, 109 U.S. 401, 402 (1883). Others arose in fields full of filing requirements designed to protect third parties, such that requiring notice could be described as "eminently just to everybody." *Vance* v. *Vance*, 108 U.S. 514, 518 (1883).[2] Indeed, in the most common con-

[2] *See also Jackson ex dem. Hart* v. *Lamphire*, 28 U.S. (3 Pet.) 280 (1830) (real-property recording statute); *Curtis* v. *Whitney*, 80 U.S. (13 Wall.) 68 (1871) (notice from purchaser at tax sale to

text—recording and notice requirements for real-property transactions—the laws did not even operate on the contract itself (let alone alter an express term), but rather imposed a consequence for failing to record or give notice, because there is no other way to run a real-estate system. These cases contrast with Minnesota's direct alteration of policyholders' rights.

6. Petitioners observe that policyholders do not buy life insurance in reliance on a plan to divorce and forget to change their beneficiary designation. Pet. Br. 50–54. That, however, describes the reliance at far too specific a level. Policyholders *do* buy life insurance in reliance on the maintenance of well-established rules determining who will get the money, especially those provided in the contract. Retroactively enforcing the new law would "interfere[] with the parties' expectations at the time of contracting," Pet. Br. 50, and adhering to the original bargain would not create "unforeseen advantages or burdens on a contracting party." *El Paso*, 379 U.S. at 515.

In this vein, Petitioners speculate about what Sveen and others might want, suggesting that he

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(continued...)

present possessor); *Louisiana* v. *New Orleans*, 102 U.S. 203, 206 (1880) (judgment-recording statute "tending to restrain and check the reckless levy of taxes, and affording in a compact form a correct knowledge of the city's liabilities"); *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982) (reverting mineral-interest ownership to the current surface owner where the interest has not been used or claimed in twenty years).

may have known (or been told by a lawyer) about the revocation statute before his divorce. Pet. Br. 53–54. Petitioners never explain why Sveen or his lawyer would have known about Minnesota's new law, but not the Eighth Circuit's decision limiting Oklahoma's materially identical statute to prospective effect. *See Whirlpool*, 929 F.2d at 1322–23. Moreover, there are multiple cases in which policyholders sought to keep their ex-spouse as their beneficiary in the presence of a revocation-upon-divorce statute, and were told that they did not need to take any steps to re-designate the ex-spouse. *Jenson*, 2012 WL 848158, at *1; *State Farm Life Ins. Co.* v. *Davis*, 2008 WL 2326323, at *1 (D. Alaska June 3, 2008). Bad advice runs both ways.

B. Retroactive Application of Minnesota's Statute Does Not Further a Significant and Legitimate Purpose

To justify a law impairing contracts, there must be evidence (not conjecture) that the law was crafted to remedy a broad social problem, and the good the law does must outweigh its harms. Petitioners cannot make those showings here.

1. Any permissible impairment of contractual obligations must serve a "significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at 411. Contrary to Petitioners' claims, Pet. Br. 56–57, to meet this test they must show more than that Minnesota's law "more likely than not" solves a problem. Instead, there must be "*evidence* of a significant and legitimate public purpose underlying" the law; "post hoc rationalization" does not suffice. *Equip. Mfrs.*, 300 F.3d at 860, 862 (emphasis add-

ed); *see also Allied Structural*, 438 U.S. at 247–49 (limiting the inquiry to evidence "in the record"). As this Court has made clear, the Contracts Clause analysis is *not* rational basis review. *See Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 732–33 & n.9 (1984). It is not enough to pontificate justifications for the law.

In addition, the interest that the law furthers must be a "broad societal" one, not just the interest of a "narrow class." *Allied Structural*, 438 U.S. at 249. A law that purportedly solves a small problem or panders to a niche group will not be sufficient to justify impairing contracts. *See id.*

Finally, the test is a balance: any benefits of the law must be weighed against its costs. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Id.* at 248.

2. "There is no showing in the record before [the Court] that this severe disruption of contractual expectations was necessary to meet an important general social problem." *Id.* at 247. Petitioners first claim that Minnesota's revocation-upon-divorce statute more accurately reflects the intent of policyholders upon divorce. Pet. Br. 56–57. Whatever intuitive appeal this explanation has, Petitioners point to no evidence that this intent problem exists, or that this was the aim of the Minnesota legislature. *See id.* "There is no statement of legislative intent or any other legislative history from which to directly ascertain the purpose of the Act." *Equip. Mfrs.*, 300 F.3d at 860. All Petitioners offer are hypotheticals for the wisdom of Minnesota's law. They claim the "legislature made the empirical determination that,

in the mine run of cases, the statute advances the policyholder's intent." Pet. Br. 57. But Petitioners provide no evidence that this belief is empirically true, much less that the legislature made such a determination. "Without evidence of a significant and legitimate public purpose underlying" the law, it "is void as applied" retroactively. *Equip. Mfrs.*, 300 F.3d at 860.

If anything, the evidence cuts against Petitioners' claim. The only quasi-legislative history Petitioners offer is a statement from the Uniform Probate Code (UPC), which served as the model for Minnesota's law. According to the drafters of the UPC, "the theory of this section," UPC § 2-804 cmt, is that people were increasingly using "will substitutes, such as revocable trusts," and since states already treated divorce as revoking beneficiary status in a will, the same treatment should be extended to "all of the arrangements that are functionally equivalent to wills," Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 690, 692 (1992). That hardly matches up with Petitioners' chief justification for the law.

In addition, as noted above, "there are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds." *Hughes*, 900 S.W.2d at 607. Whether to provide for the couple's children, serve as an investment, or serve as collateral for other obligations, policyholders may well wish to leave their beneficiary designations unchanged. *Supra* 11–13. To vitiate these policyholders' intent in the service of furthering a hypothetical policyholder's intent is hardly the

stuff of a legitimate (let alone significant) state interest. Perhaps that is why nearly half the states and the federal government have not adopted a revocation-upon-divorce statute for life-insurance policies.

3. Even if Petitioners could muster evidence that there was a problem when it came to life insurance and that Minnesota was trying to solve that problem with its law, the interest would still be insufficient to justify the impairment at issue. For one, "an impairment is not a reasonable one if the problem sought to be resolved by an impairment of a contract existed at the time the contractual obligation was incurred." *Massachusetts Cmty. College Council* v. *Commonwealth*, 649 N.E.2d 708, 713 (Mass. 1995) (citing *U.S. Trust Co.*, 431 U.S. at 29). There is no evidence that the purported problem arose after Sveen signed his contract. In fact, by 1990, several years prior, the Uniform Probate Code already recommended that states enact revocation-upon-divorce statutes for life insurance. Pet. Br. 7.

Further, there is a difference between laws "limited in effect to contractual obligations or remedies" and those that "advance a broad societal interest." *Exxon*, 462 U.S. at 191. The former are subject to far more searching inquiry. *Id.* Minnesota's revocation-upon-divorce statute is clearly not general social legislation that applies to individuals "regardless of whether they happened to be parties to ... contracts." *Id.* Instead it applies *only* to contracts, and only to a narrow class of contracts at that. The law does not apply where the "express terms" of a "court order" or a "contract relating to the division

of the marital property" addresses the issue. Minn. Stat. § 524.2-804, subd. 1. That of course covers the mine run of cases because "life insurance often assumes an important role in a marital settlement agreement or divorce decree." Danielle E. Miller, *Estate Tax Impact of Life Insurance Required by Divorce*, 43 Est. Plan. 19, 19 (2016). The law also does not apply to policies subject to federal regulation, *Egelhoff*, 532 U.S. at 150 (ERISA preempts such statutes); *Hillman*, 569 U.S. at 497 (FEGLIA does too), which account for a substantial number of policies, *see* American Council of Life Insurers, Life Insurers Fact Book 2017, at 72 table 7.9. And of course, the law applies only where the policyholder does not designate a beneficiary after his divorce.

What is left is an exceedingly narrow class of contracts. Minnesota's law is thus not solving an "important general social problem." *Allied Structural*, 438 U.S. at 247. Rather it is "limited in effect to contractual obligations or remedies" of a small set of contracts. *Exxon*, 462 U.S. at 191.

Examining that narrow class of contracts further shows why the law does not serve a significant public purpose. The supposed benefit of the law, effectuating intent, obviously cuts both ways. For every inattentive policyholder who wishes to cut off an ex-spouse, there may well be an inattentive policyholder who does not. The law's other "benefits" are equally illusory. Petitioners suggest that "even for attentive spouses, revocation-upon-divorce statutes save them the time and paperwork of revoking their beneficiary designations." Pet. Br. 57. But in contrast to the paradoxical requirement that inat-

tentive spouses re-designate—on pain of benefits going to someone else—the burden on attentive spouses is trivial. Petitioners also opine that the law "ensures parallel treatment of beneficiary designations in wills and insurance policies." Pet. Br. 58. But as explained, people choose different instruments for different reasons, and symmetry is not obviously desirable here. Petitioners finally claim that these statutes "avoid litigation on whether ambiguous divorce decrees revoke beneficiary designations." Pet. Br. 58. But these statutes do not "avoid litigation," they just shift it to the question of whether there is sufficient evidence to overcome the revocation. *See, e.g.*, *Jenson*, 2012 WL 848158; *Davis*, 2008 WL 2326323. Indeed, this case contained a dispute over whether Melin had an oral contract with Sveen to leave beneficiary designations unchanged. *See* Pet. App. 10a, 15a. The supposed benefits of this law simply cannot overcome the drastic impairment it causes on the narrow class of contracts the law affects.

Further confirming that the balance weighs against Minnesota's law is that "a less drastic modification would have" served Minnesota's goal of correcting the oversight of some divorcés. *U.S. Trust*, 431 U.S. at 30. As discussed, *supra* 31–32, Virginia law requires all divorce decrees to prominently give notice that divorce may or may not automatically revoke life-insurance-beneficiary designations. Another approach would be to require divorce courts to confirm that the divorcing couple has reviewed their life-insurance policies. These approaches—which Minnesota easily could have

deployed—do not impair contracts but still serve the goal of effectuating the policyholder's intent.

3. Finally, if Minnesota's law did serve a significant purpose, one would expect Minnesota to say so. But Minnesota has not entered an appearance, let alone filed a brief defending its statute—not in the district court, not in the Eighth Circuit, and not here.

Minnesota is not the only state that views retroactive application of such statutes as a trifling matter. Even though Arizona's law is imperiled by a case pending before this Court, *Lazar* v. *Kroncke*, No. 17-521 (filed Oct. 3, 2017), it did not file an amicus brief in this case. In fact, none of the 27 states whose laws may be declared unconstitutional as applied retroactively thought them important enough to defend in this case. The absolute lack of state interest makes it difficult to accept that these laws serve a significant purpose.

C. Retroactive Application of Minnesota's Statute Is Neither Reasonable nor Appropriate

Application of Minnesota's law to settled contracts is neither "reasonable" nor "of a character appropriate to the public purpose justifying its adoption." *Allied Structural*, 438 U.S. at 244. It may be that some individuals would prefer that upon divorce their ex-spouse be automatically removed as a beneficiary to a life-insurance policy, but this is "certainly not a universal truth." *Whirlpool*, 929 F.2d at 1323; *see also* Brief for the United States as Amicus Curiae, *Hillman*, 2013 WL 1326956, at *28. As explained above, "there are of-

ten valid reasons why an insured would want a former spouse to receive his insurance policy proceeds." *Hughes*, 900 S.W.2d at 607.

That may be why almost half of the fifty states have declined to do so, and why Congress has declined to implement a similar revocation-upon-divorce rule for policies covered by ERISA or FEGLIA. The best way to discern the decedent's intent remains the decedent's explicit designation of a beneficiary. By ignoring that reality, retroactive application of Minnesota's revocation-upon-divorce statute is not "based upon reasonable conditions" nor is it "of a character appropriate to the public purpose justifying the legislation's adoption." *Energy Reserves*, 459 U.S. at 411.

Minnesota's law is unreasonable for a second reason. As discussed, the law's premise is that people fail to realize they need to revisit their life-insurance policies after they divorce. But that assumption suggests those same individuals will not know that the state law governing the insurance policy changed. Those inattentive individuals that the state is trying to help may be relying on the law they understood when they signed the life-insurance contract, or they may just want to keep their former spouse as their beneficiary but have no idea that state law seeks to thwart that outcome. *See Whirlpool*, 929 F.2d at 1323.

Finally, confirming the unreasonableness of applying Minnesota's statute retroactively is that "a less drastic modification would have" served Minnesota's goal of correcting the oversight of some ex-spouses. *U.S. Trust*, 431 U.S. at 30. Minnesota

could easily require divorce decrees to prominently give notice that divorce may or may not automatically revoke life-insurance beneficiary designations. *Supra* 31–32. This alternative approach does not impair contracts but still serves the legislature's goal of ensuring the policyholder thinks anew about who the beneficiary should be.

* * *

This Court used to enforce the Contracts Clause according to its terms; for nearly 150 years, it recognized the Framers' "great principle, that contracts should be inviolable." *Sturges*, 17 U.S. (4 Wheat.) at 206 (Marshall, C.J.).

It should do so again. Under the original understanding of the Contracts Clause—devoid of balancing—because Minnesota's law impairs contractual obligations, it cannot be applied retroactively. Even under a more moderate course correction—treating laws affecting private contracts on par with laws affecting public contracts—Minnesota's law fails, as Minnesota could easily achieve its objectives without impairing contracts.

But even under this Court's current approach, "this Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution." *Allied Structural*, 438 U.S. at 250. "If the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do ... in this case." *Id.* at 250–51.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,
Petitioners,

v.

KAYE MELIN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Respondent asks this Court to overrule *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and its progeny, which apply a deferential standard of review under the Contracts Clause. Even if this radical suggestion had merit, it would not change the outcome of this case. Petitioners have put forward five independent grounds for reversal. Only one depends on *Blaisdell*'s deferential standard. The other four would have been just as persuasive to the Marshall Court as they are today:

- The Contracts Clause does not restrict states from prescribing the effect of a divorce decree. This view was first expressed almost 200 years ago. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819) (Marshall, C.J.) (the Contracts Clause "never has been understood to restrict the general right of the legislature to legislate on the subject of divorce").

- Statutes affecting the donative component of a life insurance policy do not "impair" a contractual "obligation." Rather, they are analogous to statutes affecting beneficiary obligations in wills, which raise no Contracts Clause issues.

- Revocation-on-divorce statutes do not "impair" a contractual "obligation" because they merely construe a divorce as the exercise of the policyholder's option to change the beneficiary designation.

- Revocation-on-divorce statutes do not

"substantially" impair obligations because they implement a default rule that does not interfere with reliance interests. This argument is based on nineteenth-century authorities dating back to the Marshall Court. *See, e.g., Jackson ex dem. Hart v. Lamphire*, 28 U.S. 280 (1830).

Only if the Court rejects all four of those arguments need it consider Petitioners' fifth argument: that revocation-on-divorce statutes satisfy the modern standard of *Blaisdell* and its progeny. Should it reach that argument, the Court should reject Respondent's invitation to overrule a line of cases dating back 84 years, particularly given that Minnesota's statute exhibits none of the evils the Contracts Clause was intended to guard against. If the Court adheres to its precedent, this case is straightforward: Minnesota's statute is constitutional because it is a reasonable means of advancing legitimate public purposes.

I. REVOCATION-ON-DIVORCE STATUTES ARE A VALID EXERCISE OF STATES' SOVEREIGN AUTHORITY OVER DIVORCE.

Minnesota's statute is best understood not as a retroactive impairment of a contract, but as an amendment to Minnesota divorce law. The statute's effect was to insert an implied term into the parties' divorce decree that revoked a beneficiary designation. That exercise of a State's police power does not offend the Contracts Clause.[1]

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[1] Contrary to Respondent's suggestion (Resp. Br. 37), Petitioners

Two points are critical. First, revocation-on-divorce statutes do nothing unless a spouse files for divorce, which vests the divorce court with the plenary authority to divide the parties' assets. Second, that authority existed even before there was a revocation-on-divorce statute. Prior to the statute's enactment, divorce courts not only had the power to revoke life insurance beneficiary designations, but the power to force the policyholder to retain his ex-spouse as the beneficiary. Thus, the effect of the revocation-on-divorce statute was not to insert the State into a decision previously reserved to the contracting parties, but to regulate a decision that already was vested in the State prior to the statute's enactment—*i.e.*, the fate of a beneficiary designation in divorce. Pet. Br. 17-23.[2]

This case, therefore, falls squarely within the principle that "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). There is no impairment of a contractual obligation, because under pre-existing law, the fate of the beneficiary designation was not up to the

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did not waive this point. Petitioners preserved their *claim* that revocation-on-divorce statutes comply with the Contracts Clause; this is an *argument* supporting that claim. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). It thus is comparable to Respondent's extended argument that *Blaisdell* should be overruled, which was previewed only in passing in the BIO (at 3).

[2] This position would present no Full Faith and Credit issues (Resp. Br. 40). Minnesota's statute does not purport to apply extraterritorially, *i.e.*, to divorces by courts outside Minnesota.

contracting parties; it was up to the divorce court. Respondent contends that under the Contracts Clause, buying a policy effectively freezes State divorce law in place, thus disabling States from amending their divorce laws—even as applied to future divorces. That is wrong. The Contracts Clause does not prevent a State from regulating the exercise of power vested in state actors.

Respondent's position is particularly implausible given that the divorce court has the pre-existing power to force a policyholder to maintain an ex-spouse as beneficiary against his will—a far greater intrusion into contractual rights than a default rule of revocation. Pet. Br. 21-22. Respondent responds that this pre-existing power is different because it springs from judge-made law. Resp. Br. 38-39. But this misses the point, which is that the power to decide the fate of the beneficiary designation was already vested in the divorce court at the time of contracting.

Respondent insists that *judges* can revoke beneficiary designations, or even order divorcing spouses to maintain existing insurance policies for their ex-spouses; but if *legislatures* enact statutes authorizing such orders that deviate from pre-existing judge-made law, such statutes violate the Contracts Clause. *Id.* Respondent's position would augur an unprecedented transfer of the police power from state legislatures to state judges. Contrary to Respondent's suggestion, such orders are not comparable to garden-variety orders ancillary to contract enforcement, such as orders reforming contracts in cases of fraud or mistake. They reflect the substantive exercise of

regulatory authority over divorce. The Contracts Clause does not require that this authority be exercised only by judges.

Respondent offers two *reductiones ad absurdum* ostensibly flowing from Petitioners' position. Both are misguided.

First, according to Respondent, Petitioners' position would imply that divorce courts could abrogate third party contractual interests. Resp. Br. 37. That is incorrect. Divorce courts are vested with power to sever the spouses' legal relationship, not abrogate third party interests.

Second, according to Respondent, Petitioners' position would imply that States could enact statutes abrogating prenuptial agreements. Resp. Br. 37-38. Respondent posits a scenario in which prenuptial agreements are *binding* on divorce courts, and the State then passes a law permitting divorce courts to disregard them. *Id.* Here, by contrast, life insurance beneficiary designations did not bind divorce courts under pre-existing law. Unlike a prenuptial agreement, which is an agreement between the spouses that governs asset distribution in divorce, an insurance policy is an asset held by one spouse. Divorce courts have always had the discretionary power to dispose of life insurance policies—like any other asset—in whatever manner they deemed equitable. Minnesota's statute regulating that power does not violate the Contracts Clause.[3]

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[3] Moreover, it is unclear that statutes affecting prenuptial

History confirms that statutes prescribing the effect of a divorce decree do not implicate the Contracts Clause. Chief Justice Marshall stated that the Contracts Clause "never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 629 (1819). James Kent's *Commentaries on American Law* declared that it "has generally been considered that the state governments have complete control and discretion" over the dissolution of marriages, and "in ordinary cases the constitutionality of the laws of divorce in the respective states, is not to be questioned." 2 James Kent, *Commentaries on American Law* 89-90 (O. Halsted, ed. 1827). Respondent declines to address these authorities.

Moreover, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court held that a divorce conferred by the legislature did not violate the Contracts Clause. *Id.* at 210. The Court rejected the argument that marriage is a "contract" under the Clause. *See id.* If legislative divorces are constitutional, revocation-on-divorce statutes are too, given that legislative divorces have a far more dramatic effect on contractual interests than revocation-on-divorce statutes, which merely prescribe one consequence of divorce. Notably, the ex-wife in *Maynard* argued that the decree interfered with a property interest that would have vested if she stayed married—an interest comparable to Respondent's

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agreements would implicate the Contracts Clause, given this Court's holding that marriage contracts are not "contracts" under the Clause. *Maynard v. Hill*, 125 U.S. 190 (1888).

unvested interest in the life insurance proceeds—yet the Court still found no constitutional violation. 125 U.S. at 216.

Respondent's position is ahistorical in another sense. Under Respondent's approach, virtually *any* change in the law of property distribution, which changes the treatment of pre-existing assets in divorce, could violate the Contracts Clause. Yet despite dramatic historical changes in the law of property distribution, Respondent identifies no court that has struck down any such law (other than revocation-on-divorce statutes) under the Contracts Clause. As Petitioners explained (Pet. Br. 25-28), Respondent's position would severely constrain States' power to amend their divorce laws. Especially against the traditional background of deference to State family law, the Court should not extend the Contracts Clause to laws prescribing the effect of divorce.

II. STATUTES AFFECTING THE DONATIVE COMPONENT OF A LIFE INSURANCE POLICY DO NOT VIOLATE THE CONTRACTS CLAUSE.

Alternatively, revocation-on-divorce statutes do not violate the Contracts Clause because they affect only the donative component of the insurance policy. For Contracts Clause purposes, they thus should be treated like statutes affecting beneficiary designations in wills.

Respondent argues that a beneficiary designation is "contractual." Resp. Br. 40-42. But under the constitutional text, the question is whether Minnesota's statute "impair[s]" an "obligation." The answer is no.

When there is a dispute over the proceeds, the insurer's sole obligation—both before and after the statute's enactment—is to deposit the proceeds in the Court's registry. Respondent points out that Minnesota's revocation-on-divorce statute changes state law applied by the *court* (Resp. Br. 43-44), but it does not change the *insurer*'s obligation.

Moreover, a change to a beneficiary designation cannot possibly constitute a change in the insurer's "obligation" because the policyholder can do so *unilaterally*—in violation of black-letter law that mutual consent is necessary to alter a contractual obligation. Pet. Br. 32. Respondent does not address this point.

This argument makes perfect sense because it ensures that States can enact legislation treating all bequests consistently upon divorce—that is, legislation revoking beneficiary designations in both probate and nonprobate transfers. Pet. Br. 32-35. Respondent maintains that there are policy reasons to treat life insurance policies differently from wills. But these rationales have little application in life insurance policies that function as investments (such as "whole" life insurance policies), or other contractual interests such as revocable trusts that function as will substitutes. *Id.* In any event, Respondent's policy arguments do not support interpreting the Contracts Clause to prohibit States from enacting a uniform law of bequests.

Respondent is of course correct that the selection of the insurance policy beneficiary is important to the policyholder (Resp. Br. 34-35), but that is not the point.

The point is that the Contracts Clause protects reciprocal economic relationships, not unilateral decisions to make bequests. States have the historic power to regulate such unilateral choices in the context of wills, and they should have the parallel power for nonprobate transfers.

Respondent once again offers a *reductio ad absurdum*. She argues that under Petitioners' position, States could alter beneficiary designations even *without* giving policyholders the option of changing them back. Resp. Br. 42-43. That is indeed the *reductio* of this particular argument. (To be clear, it is the *reductio* of *only* this argument, and not the other four. The argument in Section I is specific to divorce, while the arguments in Sections III, IV, and V depend on the fact that revocation-on-divorce statutes provide a default rule). But it is not *absurdum*; indeed, such statutes currently exist. For example, Minnesota's statutory-share statute requires spouses to give one-third of their "augmented estate"—which includes life insurance proceeds—to their spouses, with no opt-out. Minn. Stat. § 524.2-205(1)(iii); Pet. Br. 37-38. In Petitioners' view, this statute is a constitutional exercise of States' police power to protect surviving spouses. Respondent apparently agrees—she would uphold the statute because "widowers should be taken care of upon their spouse's death." Resp. Br. 45.

Respondent also hypothesizes a State law in which insurance beneficiaries are chosen randomly. Resp. Br. 42. That unlikely law would be terrible policy, but so would a law in which the beneficiaries of wills are chosen randomly. Neither law violates the Contracts

Clause.

That is not to say that States can alter will beneficiary designations whenever they want. A distinct body of law protects against statutes retroactively altering beneficiary designations in will and trust instruments, typically when the statute is enacted after the testator's death, when the beneficiary has already acquired a vested interest. *See, e.g., Bird Anderson v. BNY Mellon, NA*, 974 N.E.2d 21 (Mass. 2012) (statute altering beneficiary designation after testator's death violated due process). That is the logical body of law to apply to statutes affecting life insurance beneficiary designations.

Further, Respondent's position would interfere with a wide array of probate legislation, ranging from "slayer" statutes that disinherit murderers from receiving their victims' insurance proceeds, to statutes treating adopted and biological children in parallel, to the aforementioned statutory-share statutes. Pet. Br. 36-38. Respondent appears to concede that her approach would invalidate all those statutes—she speculates that they might pass muster under the *Blaisdell* approach she spends most of her brief disavowing. Resp. Br. 45. The Court should think twice about adopting a rule in which the Contracts Clause requires the proceeds of life insurance to be given to the policyholder's murderer, requires States to treat adopted children worse than biological children, and prohibits States from protecting surviving spouses. No case from this Court has endorsed such a dramatic

interference into the law of bequests,[4] and the Court should be wary of injecting the Constitution into this traditional area of state law.

III. REVOCATION-ON-DIVORCE STATUTES DO NOT IMPAIR CONTRACTUAL OBLIGATIONS; RATHER, THEY CONSTRUE DIVORCE AS AN EXERCISE OF CONTRACTUAL RIGHTS.

Suppose a State enacted a statute providing that it is no longer necessary to change a beneficiary designation in writing; an oral statement is good enough. No English speaker would characterize this statute as "impairing" the insurer's obligation. The insurer still has the obligation to give the proceeds to the policyholder's chosen beneficiary. The policyholder still has the right to choose, and change, the beneficiary. The statute merely identifies the circumstances under which state law construes the policyholder as exercising an option to change the designation.

Revocation-on-divorce statutes do the same thing. They construe divorce as reflecting the exercise of the policyholder's intent to change the beneficiary. The insurer's obligations are not *impaired*—it still is

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[4] The state-law cases cited by Respondent (Resp. Br. 45) involve different scenarios. In *Bird*, the statute retroactively changed a trust instrument *after the testator's death*. 974 N.E.2d at 32-33. In *Estate of Gab*, 364 N.W.2d 924, 925-26 (S.D. 1985) the statutory-share statute interfered with an agreement *between the spouses*. The court did not allow one spouse to defeat the statutory-share statute via a unilateral purchase of a non-probate asset.

obliged to give the money to the policyholder's selected beneficiary, which the policyholder may change at will. Even if the statute might be said to *alter* the insurer's obligation, it does not *reduce* it, which is what "impaired" means.

Respondent contends that Minnesota's statute impairs the insurer's obligation to award proceeds *in accordance with the policy*, which requires changes to beneficiary designations to occur in writing. Resp. Br. 46-47, 49. But Respondent overlooks that even before the revocation-on-divorce statute was enacted, divorce decrees could alter beneficiary designations, even without notice to the insurer, so long as they did so expressly. *See, e.g., Larsen v. Nw. Nat'l Life Ins. Co.*, 463 N.W.2d 777, 779-80 (Minn. Ct. App. 1990). Minnesota's statute merely determines *which* divorce decrees will revoke beneficiary designations.

Respondent's argument has a more fundamental flaw. Her view is that *any* change to state contract law that alters pre-existing judge-made law is *necessarily* an impairment of a contractual obligation. Resp. Br. 47. That view reads "impair" out of the Contracts Clause. The Contracts Clause says "impair"—not "alter." Indeed, the Framers stripped the word "alter[]" from the original draft of the Clause and narrowed its coverage to only those laws that "impair[] the obligation of Contracts." Pet. Br. 43. A statute allowing insurers to avoid paying would "impair"—reduce—the insurer's obligation. A statute that preserves the insurer's payment obligation and construes a divorce as the exercise of an option does not.

IV. REVOCATION-ON-DIVORCE STATUTES DO NOT "SUBSTANTIALLY" IMPAIR CONTRACTUAL OBLIGATIONS.

Only substantial impairments of obligations implicate the Contracts Clause. Pet. Br. 42. Because revocation-on-divorce statutes reflect a default rule—which can be overcome either via an express statement in the divorce decree, or via a post-divorce beneficiary change—they do not violate the Clause.

A. The Paperwork Obligation to Re-Designate an Ex-Spouse is Not a Substantial Impairment.

Respondent's position is foreclosed by a line of cases—largely from the nineteenth century, an era of peak Contracts Clause enforcement—holding that a paperwork burden is not an "impairment," even if it affects pre-existing contracts.

For instance, in *Gilfillan v. Union Canal Co. of Pennsylvania*, 109 U.S. 401 (1883), the statute at issue construed a bondholder's failure to object to a debt settlement as consent. This Court upheld the statute, pointing out that if the bondholder "does not wish to abandon his old rights and accept the new, all he has to do is to say so in writing to the president of the company." *Id.* at 406. Identical reasoning applies here. Respondent points out that the bondholder in *Gilfillan* had "actual notice" of the statute. Resp. Br. 50. But Respondent omits the reason that fact was relevant: "There is no complaint of the length of time given, and if there was it could make no difference in this case, because Gilfillan had actual notice." 109 U.S. at 406.

Thus, the Court observed that Gilfillan had actual notice in the course of rejecting an argument that Gilfillan had insufficient time to exercise his option. Respondent makes no such argument here, and offers no other basis for distinguishing *Gilfillan*.

Likewise, this Court has approved retroactive requirements to record deeds, *Jackson ex dem. Hart v. Lamphire*, 28 U.S. 280 (1830); record mortgages, *Vance v. Vance*, 108 U.S. 514 (1883); *Conley v. Barton*, 260 U.S. 677, 681 (1923); record judgments, *Louisiana v. City of New Orleans*, 102 U.S. 203, 206-07 (1880); notify landowners of tax sales, *Curtis v. Whitney*, 80 U.S. (13 Wall.) 68 (1871); and file statements of claim for mineral interests, *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). *See* Pet. Br. 45-49. Respondent explains away these diverse cases with the assertion that they "arose in fields full of filing requirements designed to protect third parties." Resp. Br. 50. This assertion is not only unsubstantiated, but also self-defeating. Respondent appears to suggest that if a contract is signed in a heavily regulated area where legislation affecting existing contracts is foreseeable, such legislation satisfies the Contracts Clause. This Court's cases endorse that approach. *See, e.g., Veix v. Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32, 38 (1940); Pet. Br. 22. But it is Petitioners who prevail under that approach, given that divorce is the ultimate regulated field: the divorce court has plenary authority over the parties' assets. Pet. Br. 23.

Respondent also asserts that in these cases, the statutes did not "operate on the contract itself." Resp. Br. 51. To the contrary, they extinguished *all*

contractual rights to the land, mortgage, or minerals. By contrast, Minnesota's statute does not extinguish the policy, but redirects the proceeds to the contingent beneficiary.

Contrary to Respondent's contention, abiding by this line of cases will not allow States to harass contracting parties by imposing arbitrary filing requirements. In each of the cited cases, this Court verified that there was a legitimate basis for the legislation. *E.g.*, *Jackson*, 28 U.S. at 290 (explaining that "[r]easons of sound policy" justified the statute). As explained in Section V, Minnesota's statute has legitimate policy rationales and would not open the door to arbitrary legislation.

The two cases Respondent emphasizes are dramatically different from this one. In both, state legislatures issued bonds to fund Reconstruction, and then passed statutes in an effort to avoid paying bondholders back. In *Seibert v. United States ex rel. Lewis*, 122 U.S. 284 (1887), Missouri enacted a statute directing the issuance of bonds, alongside a provision requiring county courts to increase taxes to meet bond obligations. *Id.* at 290. Later, Missouri barred such tax increases unless the county prosecutor petitioned the circuit court to raise taxes. *Id.* at 292. If county prosecutors did not do this, bondholders were not paid back. The Court invalidated the statute, finding the new statute "cannot fail seriously to embarrass, hinder, and delay [the bondholder] in the collection of his debt." *Id.* at 298.

Similarly, *McGahey v. Virginia*, 135 U.S. 662 (1890), was part of a line of cases involving the Virginia

legislature's efforts to avoid paying back bondholders. *See* James W. Ely, Jr., *The Contract Clause: A Constitutional History* 181-84 (2016). The bonds at issue included "coupons" that could be used to pay state taxes which "constituted a major part of the value of the bonds." *Id.* at 181. The statute at issue in *McGahey* imposed a duty on coupon-holders to produce the original bonds, which was "impracticable" because most of the bonds had been sold to out-of-state investors. *Id.* at 183; *McGahey*, 135 U.S. at 707-08. The Court invalidated the statute because it had "the effect of rendering valueless all coupons which had been separated from the bonds to which they were attached." 135 U.S. at 694.

These cases—which involved State legislatures' efforts to avoid paying their own creditors—fall in the Contracts Clause's sweet spot. They are not remotely similar to revocation-on-divorce statutes.

Respondent's remaining efforts to establish a substantial impairment miss the mark. Respondent states that "'selection of a beneficiary is the entire point of the contract.'" Resp. Br. 35. But in assessing whether there is a substantial impairment, this Court has looked to the paperwork obligation, not the consequence of failing to abide by it. In the above-cited cases, the failure to abide by recordation or notice obligations completely extinguished *all* interest in the contract, yet this Court upheld those statutes by holding that the recordation and notice obligations themselves were not impairments. This case thus is distinguishable from *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), on which Respondent

relies (Resp. Br. 34); in that case, the obligor could not restore its pre-existing pension obligations by filing paperwork.

Respondent's citation of this Court's preemption jurisprudence (Resp. Br. 35-36) is unhelpful. In *Wissner v. Wissner*, 338 U.S. 655 (1950), the Court held that a federal statute specifically governing the disposition of insurance benefits upon death preempted state community-property law which disposed of the benefits differently. In *Hillman v. Maretta*, 569 U.S. 483 (2013), the Court held that a federal statute that "described the precise conditions under which a divorce decree could displace an employee's named beneficiary" preempted a state statute revoking beneficiary designations under different circumstances. *Id.* at 495-97 & n.5. Obviously, federal statutes explicitly regulating bequests and divorces will preempt conflicting state regulations of bequests and divorces. Those holdings shed no light on the interpretation of the Contracts Clause.

Respondent contends that revocation-on-divorce statutes are premised on the expectation that some policyholders might forget to update beneficiary designations. Resp. Br. 49-50. But Minnesota's statute applies to all policyholders, attentive and inattentive alike. The State is entitled to enact legislation aligning the law governing wills and insurance policies for *all* citizens, even if for attentive citizens, the statute merely saves them a paperwork obligation.

There is no doubt that Minnesota anticipated that there would be forgetful policyholders. But that was also true in *Gilfillan*, where the statute facilitated the

approval of a bondholder settlement by ensuring that bondholders could not hold it up by failing to mail a consent form. *See* 109 U.S. at 405-06. Like this case, the settlement was deemed to be in the interest of the contracting parties, including the forgetful ones. *See id.* The Court upheld the statute based on its view that the paperwork requirement was minimal, *id.*—the same argument Petitioners advance here.

Likewise, in the statutes involving recording obligations, the legislatures clearly anticipated people might forget—the whole point of the statutes was to facilitate commercial activity that would occur if the obligations were not satisfied. In *Texaco*, for instance, the express statutory purpose was to facilitate "development of ... mineral interests" by extinguishing "stale and abandoned interests"—which would only happen if people did not file the paperwork. 454 U.S. at 523 (quotation marks omitted). Yet, the Court still upheld those statutes on the ground that the paperwork burden was insubstantial. Admittedly, this case differs from those cases in that Minnesota's statute protects the typical forgetful policyholder by implementing his presumed intent. By contrast, in those cases, the forgetful contracting party was stripped of all contractual rights; the legislative goal was to benefit third parties. But this distinction is helpful, not harmful, to Petitioners. The point of enforcing contracts is to vindicate the contracting party's intent. It makes no sense to single out Minnesota's statute as worthy of invalidation precisely *because* it seeks to vindicate policyholders' intent. Statutes extinguishing contracting parties' rights in an

effort to advance others' interests are the evil to which the Contracts Clause was directed; it would be illogical to subject such statutes to *less* judicial scrutiny.

B. Revocation-on-divorce Statutes Do Not Interfere with Policyholder Obligations.

No one signs a contract in reliance on the absence of a revocation-on-divorce statutes. Few people think about divorce when they buy life insurance. And if they do, they certainly would not rely on the law's treatment of *ambiguous* divorce decrees. No one buying insurance would have any reasonable expectation as to the fate of a beneficiary designation upon a hypothetical divorce—that would depend either on a follow-on settlement negotiation between the spouses, or the decision of a divorce court, neither of which is predictable at the time of contracting.

Respondent does not seriously suggest that revocation-on-divorce statutes interfere with reliance interests at the time of contracting. Instead, she argues that a high level of generality, people assume the law will not change when they enter contracts. Resp. Br. 51. But this Court's case law requires an examination of whether the particular challenged statute interferes with reliance expectations at the time of contracting. *See* Pet. Br. 50; *City of El Paso v. Simmons*, 379 U.S. 497, 514-15 (1965). This one clearly does not.

Indeed, this analysis follows directly from the Contracts Clause's text. The Contracts Clause prohibits "impairments" of contract—*i.e.*, laws that

"tend[] to diminish the value" of a contract. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 32 (1823). No reasonable policyholder would pay less for an insurance policy based on the knowledge that in the event of a divorce, if neither the marital settlement nor the divorce court expressly addresses the beneficiary designation, the decree would revoke the designation subject to the policyholder's right to re-designate the ex-spouse. The statute is therefore constitutional.

Indeed, it is *Respondent*'s position that would impair reliance interests, by overturning divorce settlements—like the one in this case—that were negotiated with the revocation-on-divorce statute on the books. Respondent speculates (Resp. Br. 51-52) that Mark Sveen might have predicted at the time of the settlement that his children would live out of state when he died, opening the door for a diversity jurisdiction interpleader action in which the Eighth Circuit would strike down Minnesota's revocation-on-divorce statute under its *Whirlpool* precedent. This is unlikely, and Respondent's argument would not work for policyholders living outside the Eighth Circuit (or within the Eighth Circuit absent diversity jurisdiction).

Respondent also misses a more fundamental point. Revocation-on-divorce statutes do create reliance interests. But those reliance interests arise not at the time the policy is purchased, but at the time of the divorce. In particular, divorcing spouses may decline to include an express revocation term on the assumption that the statute would effectuate the revocation. Yet Respondent would effectively overturn divorce settlements enacted against the background of

revocation-on-divorce statutes, so as to reinstate the law at the time of contracting—when no reliance interests existed. That is a paradoxical position, given that the Contracts Clause is intended to protect reliance interests, not destroy them.

V. REVOCATION-ON-DIVORCE STATUTES ARE CONSTITUTIONAL UNDER *BLAISDELL*.

A. *Blaisdell* Should Not Be Overruled.

Revocation-on-divorce statutes are constitutional under the standard of *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and its progeny. The Court should decline Respondent's invitation to overrule those cases.

Blaisdell was correctly decided. Respondent contends that *Blaisdell* erroneously abrogated the Contracts Clause's absolute prohibition against the impairment of contracts. But that argument glosses over the difficult interpretive question: What is an "impairment"? Even Respondent concedes that some exercises of "traditional police power" are not "impairments" under the Clause (Resp. Br. 4). Interpreting "impairment" is difficult because the line between a permissible exercise of "police power" and an impermissible "impairment" is blurry.

Blaisdell drew that line with a healthy regard for the State's authority to enact legislation under its police power, emphasizing that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." 290 U.S. at 435. *Blaisdell* admittedly adopted a more deferential

approach than the Marshall Court, but the Marshall Court's decisions were themselves controversial. *See* Benjamin Wright, *The Contract Clause of the Constitution* 27 (1938) ("[T]he contract clause as the Framers thought of it was a very different thing from the clause at the end of Marshall's years on the Supreme Court ... [I]t is doubtful whether a Jeffersonian would have been so thoroughly imbued with the Hamiltonian distrust of legislative interferences with the rights of private property."). In construing the term "impairment," *Blaisdell* properly erred on the side of judicial restraint toward state economic legislation. As for this Court's subsequent decisions distinguishing public from private contracts, which Respondent would also overrule, those cases reflect the common-sense view that self-interested legislation warrants careful scrutiny.

Even if *Blaisdell* was wrongly decided, it should not be overruled. Respondent proposes overruling not only *Blaisdell*, but this Court's entire body of Contracts Clause jurisprudence for the past 84 years. Respondent would overrule the New Deal-era cases that relied on *Blaisdell*;[5] *City of El Paso v. Simmons*, 379 U.S. 497 (1965), which reaffirmed *Blaisdell*; and at least three Contracts Clause cases from the 1980s. Resp. Br. 8, 9-10. Respondent also would overrule the line of cases holding that public contracts are subject to increased scrutiny under the Clause. Resp. Br. 27-31.

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[5] *See, e.g., Veix*, 310 U.S. 32; *Gelfert v. Nat'l City Bank of New York*, 313 U.S. 221 (1941); *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945).

Rarely has the Court overruled so many cases, dating back so long, in one fell swoop.

Respondent identifies no pressing need for this extraordinary step. Respondent's assertion that *Blaisdell* has yielded oppressive results is belied by the fact that this Court has not heard a Contracts Clause case since *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). *Blaisdell*'s deferential standard may have deterred some litigation, but Americans are not shy about litigating under deferential standards of review. More realistically, the dearth of Contracts Clause cases shows that statutes that could even arguably implicate the Clause are rare. And if *Blaisdell*'s standard was as unmanageable as Respondent contends, one would think a single circuit split would have emerged during the past quarter-century.

It is also unclear what approach Respondent would adopt in *Blaisdell*'s place. Even before *Blaisdell*, this Court held that not "every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and National legislation." *Curtis v. Whitney*, 80 U.S. (13 Wall.) 68, 70-71 (1871). And this Court routinely inspected the policy justifications for statutes in Contracts Clause cases. It did so, for instance, in all of the nineteenth-century cases rejecting Contracts Clause challenges to paperwork burdens. To the extent Respondent advocates a standard in which *any* statute retroactively affecting contracts is unconstitutional, she advocates a standard this Court has never applied. Indeed, the Court

rejected this standard as far back as *Mason v. Haile*, 25 U.S. (12 Wheat.) 370 (1827), which upheld a statute freeing an imprisoned debtor against a Contracts Clause challenge.

This would be a particularly inappropriate vehicle to overrule *Blaisdell*. As Petitioners explained, this case implicates none of the political-process concerns underlying the Contracts Clause: State legislatures were clearly not bowing to lobbying efforts of insurers (who are indifferent) or disfavoring policyholders (who retain the option to change their beneficiary). Pet. Br. 61-63. Respondent totally ignores this point. Her erudite exposition of the historic political process concerns underlying the Clause draws no link to the facts of this case.

B. Under *Blaisdell*, Minnesota's Statute is Constitutional.

Revocation-on-divorce statutes satisfy *Blaisdell*'s deferential standard. Since the Uniform Probate Code adopted Section 2-804 in 1990, 26 States have adopted revocation-on-divorce statutes, BIO 7 & nn.2-4, including Minnesota by unanimous votes of both state houses. Hundreds of Minnesota legislators, and thousands of legislators nationally, have concluded that revocation-on-divorce statutes reflect the typical intent of divorcing policyholders, and that such statutes are good public policy.

Respondent asserts that the true reason for revocation-on-divorce statutes is to treat life insurance policies in line with wills. Resp. Br. 54. That is exactly right: The law has long assumed that a divorcing

spouse intends to change his will, and revocation-on-divorce statutes apply that same assumption to insurance policies. Pet. Br. 6-8.

Respondent questions the assumption that the average policyholder wants to change beneficiaries upon divorce, positing scenarios in which a policyholder might want his ex-spouse to receive the proceeds. Resp. Br. 12-13, 58-60. But the thousands of State legislators who approved these laws are better positioned to divine the typical intent of a divorcing spouse than Respondent or the members of this Court.

Notably, Respondent does not propose any ulterior motives by the Legislature, such as favoring insurers or disfavoring policyholders. She simply disagrees with legislators' empirical determinations. In cases like this, where statutes are enacted based on good-faith empirical judgments addressing traditional questions of state law, deference to legislative judgment should be at its zenith.

Minnesota's statute also is a reasonable means of achieving a legitimate end. It creates a default rule of revocation, while preserving the option to re-designate the ex-spouse as beneficiary, either in the divorce decree or thereafter. Contrary to Respondent's suggestion (Resp. Br. 55-56), the fact that Minnesota's statute preserves that option is a sign of its reasonableness, not a reason to strike it down. Respondent's assertion that Minnesota was dilatory by enacting its statute 12 years after the Uniform Probate Code's amendment (Resp. Br. 55) finds no basis in this Court's case law.

Respondent argues that Minnesota might have adopted other approaches, such as Virginia's approach of notifying forgetful policyholders upon divorce of the need to change beneficiaries. Resp. Br. 57-58, 59-60. But this approach would neither achieve the goal of parallel treatment of wills and insurance policies, nor foreclose litigation over the interpretation of ambiguous divorce decrees. More generally, this Court's deferential approach gives States a range of options in addressing social problems. The approach taken by 26 states is not unconstitutional merely because Virginia chose a different one.

CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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NO. 16-1432

IN THE
SUPREME COURT OF THE UNITED STATES

ASHLEY SVEEN, ET AL.,
petitioners,

v.
KAY MELIN,
respondent.

ON *WRIT* OF *CERTIORARI* TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The American College of Trust & Estate Counsel ("ACTEC") is a nonprofit organization of more than 2,500 trust and estate lawyers and law professors from throughout the United States, Canada, Central and South America, Europe and Asia. Fellows of ACTEC are skilled and experienced in trust and estate law and are elected by their peers on the basis of their professional reputation, quality of their work, and their substantial pro bono contributions to the practice and the public, including lecturing, writing, teaching, and drafting court rules and legislation. ACTEC is dedicated to enhancing trust and estate law and practice through research, education, technical advice to governments, and, on rare occasions, assisting courts in understanding this discrete area of the law.

Established in Los Angeles in 1949, ACTEC's office is now located in Washington D.C. and is governed by 39 Fellows who serve on its Board of Regents, six of whom are the officers of ACTEC. Much of the work done by ACTEC is performed by committees including the Amicus Review Committee.

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[1] Counsel for the parties were not in any way involved in authoring this brief. Neither counsel for a party nor a party made a monetary contribution to fund the preparation or submission of this brief. No other monetary contributions were made. Counsel for the petitioner and the respondent were timely notified of our intent to submit an *amicus* brief and consented to the filing of a brief by ACTEC.

The Amicus Committee and the officers of ACTEC voted unanimously to approve ACTEC's filing of an amicus brief in this case.[2]

In this case, we believe we can assist the Court in understanding the history and need for revocation-upon-divorce statutes and other statutes providing default rules of construction of estate planning documents; how those statutes are intended to work; and the importance of applying these statutes to existing estate plans, including life insurance beneficiary designations.

SUMMARY OF ARGUMENT

A person's testamentary intent is the polestar that must guide all those responsible for effectuating a person's estate plan. Testamentary intent may be elusive, because of poor articulation of that intent, a change in circumstances, neglect, or some combination of the three.

Rules of construction are designed to help judges and other persons navigate, comprehend, and effectuate intent. Importantly, rules of construction are not designed to change intent. And, a person is

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[2] The Amicus Review Committee consists of Robert W. Goldman (chair), Goldman Felcoski & Stone, P.A., Naples, Florida; Carlyn S. McCaffrey (Past President of ACTEC), McDermott Will & Emery LLP, New York, New York; Professor Robert H. Sitkoff, Harvard Law School, Cambridge Massachusetts; Bruce M. Stone (Past President of ACTEC), Goldman Felcoski & Stone, P.A., Coral Gables, Florida; Margaret G. Lodise (Chair of Fiduciary Litigation Committee of ACTEC), Sacks, Glazier, Franklin & Lodise LLP, Los Angeles, California. The committee was assisted with this brief by Eliyahu Balsam, a student at Harvard Law School.

generally free to modify, reform and better articulate his or her intent in the face of mistake, a change in circumstances, or out of recognition that his or her wishes were poorly articulated. Rules of construction of testamentary intent are typically default rules in the event changed circumstances are not addressed or mistakes, or poorly articulated intent, are not corrected during a person's lifetime.

The value of these default rules in the trust and estate practice and for our citizens cannot be overstated. Indeed, they typically come into play when the lips of the testator, settlor or insured are sealed by death, leaving the courts and others searching for the decedent's true intent. With respect to the life insurance industry, conservatively speaking, the economic consequences of determining beneficial intentions are massive. In 2014, beneficiary distributions totaled at least $109.8 billion. In that same year, the "total value of all [life insurance] policies at year end was $20.1 trillion." Sitkoff & Dukeminier, *Wills, Trusts, and Estates* 471 (10th ed. 2017) (citing Am. Council of Life Insurers, Life Insurers Fact Book 50 tbl. 5.2, 66 tbl. 7.1 (2015)).

In this case, Minnesota, like many states, created a default rule of construction applicable to, among other things, beneficiary designations of life insurance proceeds. With respect to divorced spouses, if the beneficiary designation was not restated after divorce by the insured in favor of his or her former spouse, the former spouse's interest is revoked. This construction of the beneficiary designation is consistent with common notions of human behavior and intent following a divorce.

Further, beneficiary designations involve unilateral decisions of the insured that are

ambulatory and do not involve an interest vested in the designated beneficiary until the insured's death. Revocation-upon-divorce statutes are a mechanism for construing, not impeding, the beneficiary designation. Even analyzing a life insurance contract purely from the insured's point of view, these revocation-upon-divorce statutes do not impede the truly vested contractual rights of the insured to control beneficiary designations. With or without revocation-upon-divorce statutes, insureds are free to change beneficiary designations. The statutes only provide insurers and courts a mechanism for construing the insured's intent if, after a divorce, the insured neglected to address his or her beneficiary designation.

Thus, through the lens of Contract Clause jurisprudence, the statutes are constitutionally sound and either do not implicate the Contract Clause or implicate it so minimally as to save these statutes from invalidity.

ARGUMENT

I. INTRODUCTION

ACTEC'S goal is to assist the Court in understanding revocation-upon-divorce laws, their history, and their importance in the fabric of estate planning jurisprudence. From our presentation, we hope the Court will see how the reasoning of the conflicting circuit court decisions can be appropriately resolved. ACTEC also believes it would be useful to offer some tools for analyzing older cases that are vestigial remains from when judges were forced to grapple with the impact of divorce on then less-traditional estate plans, without the benefit of clarifying legislation.

Our reference to "estate planning" and "estate plan" is much broader than perhaps your grandfather or grandmother's sense of these terms—which generally referred to a last will. In modern times, wills and the probate system for administering wills after death are often a minimal side-bar to the more financially substantial portions of the plan, involving will substitutes such as pension accounts, pay-on-death accounts, revocable trusts, and, the subject of this case, life insurance. *See* Langbein, John H., *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev.1108 (1984). Unlike the probate of a will, these will substitutes are typically administered outside the court system by individuals or corporations. Courts are only used to resolve disputes. See *Id.* at 1115-20.

II. WHAT ARE REVOCATION-UPON-DEATH LAWS AND HOW DO THEY WORK?

All rules of construction are tools for clarifying intent, whether it be legislative intent, the intent of rule makers, the intent of persons in a contractual arrangement, judicial intent, or the intent of persons who made estate plans.

In general, revocation-upon-divorce laws are rules of construction designed to clarify a decedent's intent, not change it, after he or she is dead and is unable to clarify his or her intent. Waggoner, Lawrence W., *Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J., 683,699-700 (1992). They are rules that apply in default, only if, after a divorce, the now deceased person had not taken effective steps during his or her lifetime to clarify his or her intent.

The underlying premise of the revocation-on-divorce laws is that former spouses would not intend to benefit each other in any way other than that required by court decree or settlement agreement. Obviously, it is an assumption, but it is one steeped in common sense, and everyday observation and experience. See Spitko, E. Gary, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 Ariz. L. Rev. 1063, 1964 (1999).

Importantly for this Court's analysis, these laws, including the Minnesota version, recognize and yield to the ambulatory nature of the will and will substitutes described above, and do not impede the decedent's ability to amend the will, trust, or beneficiary designation any time before death. With

respect to a revocable trust, for example, the settlor might amend his or her trust to clarify the intent to retain his or her former spouse's beneficial interest. With respect to life insurance, the insured might amend his or her beneficiary designation to clarify the intent to include the former spouse as a beneficiary. It is also possible for the settlor or insured to specify in the trust instrument or the insurance policy beneficiary designation form that the beneficiary spouse's status as a beneficiary will continue undisturbed irrespective of their marital status upon death of the settlor or insured. But, if the settlor or insured does not so provide and fails to change the trust or beneficiary designation after divorce and before death, the revocation-upon-divorce law kicks in and deems that the decedent would not have wanted his or her spouse to benefit under the trust or life insurance policy.

III. HISTORY OF REVOCATION-UPON-DIVORCE LAWS

Revocation-upon-divorce was originally an English common-law principle that grew out of the doctrine of revocation by implication. *See* Wilmit, Alan S., *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 Cornell L. Rev. 653, 655 (1988). Many states including Florida, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Ohio, Vermont, Wisconsin and Wyoming codified and expanded the doctrine from the late 19th Century to the early 20th Century. *Id.* Eventually, revocation-upon-divorce became untethered from the doctrine of revocation-

by-implication, and it became its own common-law doctrine in the early 20th Century. *Id.* at 656.

The American Bar Association was the first to codify the doctrine of revocation-upon-divorce for wills in its Model Probate Code of 1946. *Id.* That model law provided, "[i]f after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked." At the time, three states had similar statutes, but by the late 1980s, forty-four states had adopted some version of the law. The 1982 version of the Uniform Probate Code, section 2-508, similarly provided for the revocation of any devise to a former spouse contained in a will. "If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse." *See* Wilmit at 653 (listing 44 state statutes that are substantially identical to UPC § 2-504).

State statutes and the pre-1990 UPC generally only revoked beneficial interests in wills—not will substitutes. When state statutes did revoke beneficial provisions in will substitutes, it was done "piecemeal." For example, Michigan and Ohio had statutes transforming spousal joint tenancies in land into tenancies-in-common upon divorce. *See* Mich. Comp. Laws Ann. § 552.102 (1909); Ohio Rev. Code Ann. § 5302.20(c)(5) (1985). Ohio, Oklahoma, and Tennessee had statutes revoking the interest of a former spouse in revocable inter-vivos trusts. *See* Ohio Rev. Code Ann. § 1339.62 (1986); Okla. Stat. Ann. title 60, § 175 (1987); Tenn. Code Ann. § 35-50-5115 (1963). Michigan, Ohio, Oklahoma, and Texas even had revocation-upon-divorce statutes for life-insurance and retirement-plan beneficiary designations. *See*

Mich. Comp. Laws Ann. § 552.101 (1909); Ohio Rev. Code Ann. § 1339.63 (1990); Okla. Stat. Ann. tit. 15, § 178 (1987); Tex. Fam. Code §§ 3.632-.633 (1989).

Courts generally did not extend the statutes to nonprobate transfers absent legislative enactment. They instead recognized that the legislature had not extended revocation to will substitutes. When they did find that the statutes applied to will substitutes, it was *ad hoc*, inconsistent, and unconvincing. For example, in *Miller v. First Nat'l Bank & Trust Co.*, 637 P.2d 75 (Okla.1981), the Oklahoma Supreme Court extended its law on revocation-upon-divorce that was expressly limited to wills to a revocable pour-over trust. The court based its decision on the fictional idea that the trust was incorporated by reference in the will and therefore it was merely construing the will. *See Id.* at 77. In *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985), the Massachusetts Supreme Judicial Court extended the Massachusetts version of UPC 2-508 to a revocable inter-vivos trust out of a sense of fairness and interpretation of the decedent's intent. The court limited its decision to the facts of that case. *Id.* at 1093.

Further, courts in the past sometimes treated the designation of a beneficial interest in life insurance as a lifetime transfer, rather than correctly characterizing it as an ambulatory, will-like expectancy that only vested on the death of the insured. And, consistent with the incorrect premise of a lifetime transfer, some of these courts held that the designation of a beneficiary created in the beneficiary an actual interest, subject to divestment. *See Gerhard v. Travelers Ins. Co.*, 258 A.2d 724, 729 (N.J. Ch. Div. 1969); Langbein, *id.* at 1136. When reading those cases, it is critical to understand that

before modern statutory recognition and validation of will substitutes, wills, and only wills, could, in legal theory, transfer property at death. Hence, judicial efforts to justify the workings of life insurance came with a heavy stench of legal fiction. *See id.* at 1128. In fact, as is now commonly reflected by statute, will substitutes like the beneficiary designation for a life insurance policy are nothing more than ambulatory death transfers, just like wills. *Id.*

The Uniform Law Commission was bothered by results which were inconsistent and which ran contrary to what it thought the average person would intend post-divorce. The 1990 version of the UPC introduced a sweeping provision to revoke upon divorce both probate and non-probate transfers "including revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, payable-on-death accounts, and other revocable predivorce dispositions made by a divorced individual to the former spouse." *See* Waggoner, *id.* at 693. The text now reads:

> (a) [Definitions.] In this section:
> (1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.
> (2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.
(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.
(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.
(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:
(1) revokes any revocable

(A) disposition or appointment of property made by a divorced individual
to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse,
(B) provision in a governing instrument conferring a general or nongeneral
power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and
(C) nomination in a governing instrument, nominating a divorced
individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and
(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the former spouses into equal tenancies in common. [3]

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[3] The default nature of UPC 2-804 (allowing a person to draft around the statute by designating his or her former spouse as a beneficiary after the divorce) is arguably a bit subtle. One must look to the definition of "governing instrument" and apply it to the whole statute. Perhaps unwilling to engage in that subtlety, the Minnesota Legislature provides up front: "Except as provided by the express terms of a governing instrument, other than a trust instrument under section 501C.1207, executed prior to the dissolution or annulment of an individual's marriage, a

U.P.C. §2-804.

A number of states have adopted the UPC, but there are still many states that uphold the terms of the life insurance beneficiary designation of a former spouse even after divorce. *See* Raymond, Kristen P., *Double Trouble - An Ex-Spouse's Life Insurance Beneficiary Status*, CT Insur. L. Rev 19.2, 399, 407 (2013). Sixteen states have adopted UPC 2-804: Alaska, Alaska Stat. Ann. § 13.12.804; Arizona, Ariz. Rev. Stat. Ann. § 14-2804; Colorado, Colo. Rev. Stat. Ann. § 15-11-804; Hawaii, Haw. Rev. Stat. Ann. § 560:2-804; Idaho, Idaho Code Ann. § 15-2-804; Massachusetts, Mass. Gen. Laws Ann. Ch. 190B § 2-804; Michigan, Mich. Comp. Laws Ann. § 700.2807; Minnesota, M.S.A §524.2-804; Montana, Mont. Code Ann. § 72-2-814; Nebraska, Neb. Rev. St. §30-2333; New Jersey, N.J. Stat. Ann. § 3B:3-14; New Mexico, N.M. Stat. Ann. § 45-2-804; North Dakota, N.D. Cent. Code Ann. § 30.1-10-04; South Carolina, S.C. Code Ann. § 62-2-507; South Dakota, S.D. Codified Laws § 29A-2-804; Utah, Utah Code Ann. § 75-2-804. Fourteen states have laws substantially similar to UPC 2-804, but with their preferred language to express their legislature's intent. *See* Ala. Code §30-4-17 (Alabama); Cal. Prob. Code §5040 (California); §732.703, Fla. Stat. (Florida); Iowa Code Ann.

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court order, a contract relating to the division of the marital property made between individuals before or after their marriage, dissolution, or annulment, or a plan document governing a qualified or nonqualified retirement plan, the dissolution or annulment of a marriage revokes any...". M.S.A. § 524.2-804 (emphasis added).

§598.20A (Iowa); Mo. Ann. Stat. §461.051 (Missouri); Nev. Rev. Stat. Ann. §111.781 (Nevada); EPTL §5-1.4 (New York); R.C. §5315.33 (Ohio); Okla. Stat. Ann. Title 15, §178 (Oklahoma); 20 Pa. S.S.A. §6111.2 (Pennsylvania); Tex. Fam. Code Ann. §§9.301, 9.302 (Texas); VA Code Ann. §20-111.1 (Virginia); RCWA 11.07.010 (Washington); Wis. Stat. Ann. §854.15 (Wisconsin).

The UPC explains that the 1990 revision to section 2-804 was designed to: "expand the section to cover will substitutes such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce." Comment to UPC § 2-804. "The logic behind revocation-by-divorce statutes clearly applies to transfers of wealth by life insurance policies." Wilmit at 654. The Restatement 3d of Property: Wills and Other Donative Transfers, § 7.2, provides:

> Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions.

The comment to that provision in the Restatement explains:

> a will substitute is in reality a nonprobate will. A will substitute is therefore, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and

> other rules applicable to testamentary dispositions. Substantive restrictions on testation constitute important policies restricting disposition of property after the owner's death that should not be avoidable simply by changing the form of the death-time transfer. By contrast, rules of construction and other interpretative devices aid in determining and giving effect to the donor's intention or probable intention and hence should apply generally to donative documents.

Section 2-804 was intended to apply to instruments executed prior to the effective date of the adoption of the UPC by a state. Under U.P.C. §2-101(b)(5), "any rule of construction or presumption provided in this [code] applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent." It appears three UPC states have adopted this language: Massachusetts, MA. ST. Ch. 190B §1-101; New Mexico, N.M.S.A. §45-1-110, subsec., E.; and South Carolina, 2017 S.C. Laws Act 87, §6 (4). Other UPC states have modified this UPC provision. See, for example, Colorado, C.R.S.A. §15-17-101. States adopting revocation-upon-divorce statutes for will substitutes that are substantively similar to UPC §2-804 have also addressed application of their statutes to existing estate plans in their own unique ways. See, for example, Florida, §732.703 (9), Fla. Stat.; Nevada, Rev. Stat, Ann. §111.781, subsec., 10; New York, L. 2008, c. 173, § 2.

Important to this Court is that the Minnesota law and this case is not an isolated matter. The

validity of revocation-upon-divorce laws of many states hang in the balance.

IV. THE IMPORTANCE OF REVOCATION-UPON-DEATH LAWS IN SETTLING ESTATES

The decedent's intent is the polestar for settling estates. *See In re Glover's Estate*, 463 F.2d 1238, 1240 (D.C. Cir. 1972) ("Of all of the cardinal principles of will construction the foremost is that the intent of the testator must reign supreme."). The public policy of most, if not all states, is to expedite the resolution of estates and distribute assets to the beneficiaries as quickly as possible. *See Estate of Johnson*, 878 N.W.2d 510, 513 (Minn. Ct. App. 2016) ("the probate code should be construed to promote its underlying purpose and policies, including the 'speedy and efficient' liquidation of the estate").

For these reasons and the obvious inability of the decedent to cure any ambiguities or to now adjust to changed circumstances such as divorce, rules of construction to establish a decedent's probable intent are common to each state, for example, pretermitted spouse laws, pretermitted children laws, simultaneous death of spouse laws, antilapse and ademption laws, and revocation-upon-divorce laws.

At first blush, the application of some of these rules of construction, like revocation-upon-divorce laws, to documents in existence before the law became effective appears offensive to traditional presumptions against retroactively applied laws. But, this particular rule of construction applies only to the revocable aspects of will substitutes, including

a life insurance policy—not to any right vested in a beneficiary. *See Doering v. Buechler*, 146 F.2d 784, 787 (8th Cir. 1945) ("The appellant, the original beneficiary of the policy, had, during the lifetime of the insured, a mere expectancy, revocable by him."); *In re Morrison*, 403 B.R. 895, 901 (M.D. Fla. 2009) (beneficiary of life insurance policy acquires no vested right or interest during the life of the insured, only an expectancy, which is not a property interest). And, the rule only applies in default of a decedent changing his or her plan after divorce to clarify his or her intentions.

Further, recall that will substitutes have only recently been added to the statutory framework of revocation-upon-divorce, which previously only applied to wills. By not applying the same rule of construction to both wills and will substitutes in existence when this rule of construction became effective, our jurisprudence will devolve to unfair and unintended results, where, absent post-divorce planning, the assets of a divorced spouse pass one way under his or her will and differently under his or her will substitutes. As suggested at the outset of this brief, absent application of revocation-upon-divorce rules of construction to existing (but not vested) life insurance beneficiary designations could easily result in unintended windfalls of trillions of dollars to former spouses, who were presumably treated with fairness and justice in family court during the divorce. *See Sitkoff, id.*

V. APPLYING THESE PRINCIPLES TO THIS CASE

As the circuit court below recognized, it was paralyzed and unable to benefit from primary and secondary authorities that post-dated its decision in *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991). *Metropolitan Life Insurance Company v. Melin*, 853 F.3d 410, 413-15 (8th Cir. 2017) (" 'It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.' " [citation omitted] "This court's previous opinion forecloses any conclusion other than that the statute here is unconstitutional when applied retroactively.").

The *Ritter* court correctly commenced its Contract Clause analysis with the relationship between the insurer and insured, but mis-identified the insured's ambulatory, donative right to make and change beneficiary designations as something more than a mere will substitute. The *Ritter* court also failed to recognize that the revocation-upon-divorce statute before it was simply a default rule of construction, there to assist courts and other persons settling estates in determining the decedent's true intent under the circumstances (not impede that intent). In response to these missteps, ACTEC adopts the statement of the Joint Editorial Board for the Uniform Probate Code published by ACTEC in 1991, which directly addresses *Ritter*. *Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-existing Documents*, 17 American College of Trust and Estates Counsel Notes 161, 184–85 (1991). In pertinent part, the Joint Editorial Board opined:

... The JEB believes that the *Ritter* opinion is manifestly wrong. Were the error to go unnoticed and be followed elsewhere, it could seriously hamper an important and benign trend toward unifying the law of probate and nonprobate transfers.

The *Ritter* case held unconstitutional as a violation of the Contracts Clause of the federal Constitution an Oklahoma statute that resembles Uniform Probate Code § 2-804 (1990 revision). Both statutes deal with the disposition of life insurance proceeds when there has been a divorce. They provide that when the owner of a contract of life insurance dies after being divorced from the person who is named as the beneficiary in the policy, the designation in favor of the divorced spouse should be treated as having been revoked unless the policy owner expresses a contrary intention. The main purpose of these statutes is to take the same rule that has long been applied to transfers by will and apply it to other revocable transfers effective at death, such as life insurance.

...

No impairment of the obligation to pay. It is crucial to understand that a statute such as UPC § 2-804 works no impairment of the insurance company's liability to pay the proceeds due under the policy. A life insurance policy is a third-party beneficiary contract. As such, it is a mixture of contract and donative

transfer. The Contracts Clause of the federal Constitution appropriately applies to protect against legislative interference with the contractual component of the policy. In *Ritter* and in comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract. The insurance company interpleads or pays the proceeds into court for distribution to the successful claimant. The divorce statute affects only the donative transfer, the component of the policy that raises no Contracts Clause issue. The precise question in these cases is which of the decedent's potential donee-transferees should receive the proceeds. The JEB is aware of no Supreme Court authority applying the Contracts Clause to defeat state-law default rules that affect only the choice of a donee under a third-party beneficiary contract.

Intent-serving default rule. The Contracts Clause protects contractual reliance. Because statutes such as UPC § 2-804 serve to implement rather than to defeat the insured's expectation under the insurance contract, the premise for applying the Contracts Clause is wholly without foundation.

...

These statutes do not forbid transfers to the ex- spouse. They propound a default rule, not a rule of mandatory law. Because the normal inference in such circumstances is that the transferor would not want to benefit the ex-spouse, the statutes provide that the

> transferor whose intention contradicts the norm and who does indeed want to benefit the ex-spouse must express that intention.
>
> ...
>
> *No Supreme Court authority for applying the Contracts Clause to default rules.* There is no U.S. Supreme Court authority for the Eighth Circuit's extension of Contracts Clause regulation to legislative default rules. The principal Supreme Court precedent upon which the Eighth Circuit relied in *Ritter* was *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). *Spannaus* held unconstitutional a Minnesota statute that retroactively increased the pension obligations that a company would owe to its workers when the company ceased operations in Minnesota or terminated the plan. By contrast, in *Ritter*, there is no increase, decrease or other interference with the obligation of the insurer to pay the contractual proceeds. The JEB is aware of no authority for the application of the Contracts Clause to state legislation applying altered rules of construction or other default rules to pre-existing documents in any field of law, and especially not in the field of estates, trusts, and donative transfers.

Unencumbered by other panel decisions within the court, the Tenth Circuit could, and apparently did, benefit from the work of the Joint Editorial Board cited above, and from its understanding of the nature

of the revocation-upon-divorce law as a default rule of construction designed to locate, not impede, the insured's intent. *See Stillman v. Teachers Insurance And Annuity Association College Retirement Equities Fund*, 343 F.3d 1311, 1317-19 (10th Cir. 2003). We believe this case offers a sound approach to addressing the issue before the Court. *See also In re: Proceeds of Jackson National Life Insurance Company*, 2016 WL 6806359 (M.D. Fla., February 25, 2016).

For these reasons, we believe the Contract Clause is not implicated. But, if it is implicated, the revocation-upon-divorce default rule only minimally impacts on the rights of the insured in a manner insufficient to invalidate application of the law to existing life insurance policies. Indeed, before the law was adopted the insured could amend his or her beneficiary designation as he or she pleased and that did not change after the law was adopted and became effective. *See Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983) (requiring a substantial impairment of contract to violate the Contract Clause).

CONCLUSION

Minnesota's revocation-upon-divorce law validly applies and can be used to construe life insurance beneficiary designations in existence, but not vested, at the time the law became effective.

Respectfully submitted,

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No. 16-1432

In The
Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

Petitioners,

v.

KAYE MELIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PROFESSOR JAMES W. ELY, JR. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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BRIEF OF PROFESSOR JAMES W. ELY, JR. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

James W. Ely, Jr., is the Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University. His most recent book is *The Contract Clause: A Constitutional History* (University Press of Kansas 2016). The book traces the history of the Contract Clause from the Constitutional Convention (convened in part because of dissatisfaction with state-level efforts to abrogate existing contracts), through the first century of the Constitution (when the Clause was vigorously enforced by the courts), to the twentieth century (when this Court largely read the Clause out of the Constitution). The book constitutes the first comprehensive look at the Contract Clause since Benjamin F. Wright's 1938 classic, *The Contract Clause of the Constitution*. As the nation's chief living authority on the Contract Clause, Professor Ely has an interest in participating in the Court's first Contract Clause case in a generation.

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[1] In accordance with Rule 37.6, *amicus* affirms that no counsel for a party authored this *amicus* brief in whole or in part and that no person other than *amicus* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

Professor Ely is nationally renowned as a legal historian and as one of the leading experts in the field of property rights. He was awarded the Brigham-Kanner Property Rights Prize in 2006, and he has frequently lectured before the Supreme Court Historical Society. He has authored a number of other books, including *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 3d ed. 2008), *American Legal History: Cases and Materials* (Oxford University Press, 5th ed. 2017) (with Kermit L. Hall and Paul Finkelman), *The Chief Justiceship of Melville W. Fuller, 1888-1910* (University of South Carolina Press 1995, paperback edition 2012), *The Fuller Court: Justices, Rulings, and Legacy* (ABC-CLIO 2003), and *Railroads and American Law* (University Press of Kansas 2001). This Court recently cited the latter work in *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S. Ct. 1257 (2014). He has also written numerous articles dealing with the history of property rights. He served as assistant editor of the American Journal of Legal History from 1987 to 1999.

SUMMARY OF ARGUMENT

The question in this case is whether a state legislature can, consistent with the Contract Clause, retroactively rewrite existing life insurance policies so that, upon the policyholder's divorce, his or her ex-spouse is automatically un-designated as the beneficiary. Under the Contract Clause as originally understood, and as

faithfully applied by this Court for over a century, the answer to this question is easy: No. And even under this Court's more lenient, modern jurisprudence, the statute at issue is a bridge too far.

The Contract Clause is one of the few specific restrictions on the power of state governments that was written into the original Constitution. The post-independence period in America was a time of serious economic and financial distress. Desperate people began to turn to state legislatures for debt relief measures. Much of the legislation that was enacted during this period, however, had the effect of undermining credit markets and commerce. The Framers drafted the Contract Clause because they saw the evils of legislative interference with existing contracts.

From ratification through the nineteenth century, the Contract Clause was by far the most important and frequently litigated federal restraint on the power of state governments. Much of the litigation during that period concerned whether a contract existed or whether altering a contractual remedy impaired the obligation of a contract. There was never any question, however, that contracts were to be held inviolate.

That changed in the twentieth century, when this Court began to hold that the Contract Clause prohibits only "unreasonable" interference with existing contracts. This Court now applies a flexible, three-factor test to determine when the Contract Clause is violated. As a result, the Clause has largely faded to insignificance.

This Court should take this opportunity to reject the current three-factor test and return to the original understanding of the Contract Clause. Under such an approach, there is no question that Respondent must prevail. Yet, even if the Court is not inclined to fundamentally reevaluate its Contract Clause jurisprudence, Respondent must still prevail because it is not possible to rule for Petitioners without reinventing the three-factor test as a hyper-deferential, state-always-wins charade. Such a ruling would truly mean the end of the Contract Clause.

ARGUMENT

A. The Contract Clause was long one of the most important provisions of the Constitution.

This case presents the Court with an opportunity to reconsider its Contract Clause jurisprudence and to articulate a more searching standard of review that will reinvigorate the provision as a safeguard against state legislation that rewrites existing contracts.

1. The vindication of contractual rights was of crucial importance to the Framers.

The high standing accorded contractual rights by the Framers is expressed in Article I, section 10, of the Constitution, which provides: "No state shall * * * pass

any * * * Law impairing the Obligation of Contracts."[2] Drawn from similar language in the Northwest Ordinance of 1787, the Contract Clause was adopted in response to the bitter experience of state interference with contractual arrangements during the post-Revolutionary Era. State lawmakers enacted a wide variety of debt-relief laws and revoked the corporate charter of the Bank of North America.

In fact, one of the major reasons for the Philadelphia Convention was that this legislative tampering with existing agreements had aroused intense criticism and fueled the conviction that the rights of

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[2] The complete Section 10 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul [sic] of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

property owners and contracting parties would be better protected under a new constitutional order replacing the Articles of Confederation. James W. Ely, Jr., *The Contract Clause: A Constitutional History* 7–12 (2016). "Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights." Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1136; see also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42–58 (3d ed. 2008) (detailing the high value assigned to property rights by the Framers).

Feeling that the state governments could not be trusted to respect economic rights, the Framers sought in Article 1, section 10 to restrict state authority in several respects. Foremost among these limitations on state power was the Contract Clause.[3] As Justice Hugo L. Black pointed out, the Contract Clause was "one of the few provisions [explicitly limiting states' powers] which the Framers deemed of sufficient importance to place in the original Constitution." *City of El Paso* v. *Simmons*, 379 U.S. 497, 591 (1965) (Black, J., dissenting). It bears emphasis that the Framers thought a ban on state impairment of existing contracts was so vital

[3] By its express terms the Clause was binding only on the states and did not restrict congressional authority over contracts. In fact, the Bankruptcy Clause, by authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, provided Congress with explicit authority to abrogate contracts.

as to include it in the Constitution at the same time they were insisting that a bill of rights was unnecessary. See *The Federalist* No. 84 (Alexander Hamilton).

It is also significant that the Contract Clause was framed during a period of severe economic hardship. As Justice George Sutherland explained:

> Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. * * * The circulation of depreciated currency became common.

Home Bldg. & Loan Ass'n v. *Blaisdell*, 290 U.S. 398, 454–455 (1934) (Sutherland, J., dissenting). It was the judgement of the Framers that security of contracts was essential, *especially* in troubled times, for it was primarily in such times that people began to seek "legislative interference" with their contractual obligations. *Id.* at 455. This interference caused credit markets to collapse, such that "[b]onds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of 30, 40, or 50 per cent." *Ibid.*

During the debates over ratification of the Constitution, prominent members of the Convention extolled the significance of the Contract Clause as essential for preserving credit and encouraging commerce.

Alexander Hamilton, for example, argued that legislative interference with contracts would be a "probable source of hostility" between the states, encouraging retaliation and undercutting the goal of a commercially unified republic. *The Federalist* No. 7. And Charles Pinckney characterized Article I, section 10 as "the soul of the Constitution," insisting: "Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts." 4 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 333–336 (1836).

Aside from considerations of economic utility, the Contract Clause was justified in terms of beneficial social consequences. James Madison, for example, defended the Contract Clause in terms of fairness. Writing in *The Federalist*, he proclaimed that laws abridging contracts were "contrary to the first principles of the social compact, and to every principle of sound legislation," and characterized the Contract Clause as a "constitutional bulwark in favor of personal security and private rights." *The Federalist* No. 44 (James Madison).

Even some critics of the proposed constitution, known as Anti-Federalists, admitted the need for a ban on contractual impairments by the states. One acknowledged that the states had often acted irresponsibly regarding debtor-creditor relations. Another Anti-Federalist offered a proposal: "It shall be left to every state to make and execute its own laws, except

laws impairing contracts, which shall not be made at all." Ely, *The Contract Clause* 17.

2. The Contract Clause was designed to safeguard the stability of contractual arrangements and promote commerce.

The Contract Clause was grounded on the premise that honoring contractual arrangements served the public interest by encouraging commerce. As Charles A. Beard observed: "Contracts are to be safe, and whoever engages in a financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played." Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 179 (1913). Stability of agreements was crucial in a growing market economy. As Roger Sherman and Oliver Ellsworth, Connecticut delegates to the Constitutional Convention, explained, the Convention believed the Contract Clause was "necessary as a security to commerce, in which the interests of foreigners, as well as the citizens of other states, may be affected." Ely, *The Contract Clause* 14.

Likewise, John Marshall understood the adoption of the Contract Clause to be a response to deleterious state abuses which threatened commerce and credit. In 1827 Marshall linked the Clause with a desire to foster commercial transactions:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every

> man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as to not only impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.

Ogden v. *Saunders*, 25 U.S. 213, 354–355 (1827) (Marshall, J., dissenting).

3. The Contract Clause was frequently litigated and vigorously enforced by the courts.

During the 1790s there were harbingers of the key role that the Contract Clause would play throughout much of our history. The Clause figured prominently in early federal court decisions. In fact, the first federal court decision invalidating a state law was grounded on the Contract Clause. In *Champion and Dickason* v. *Casey* (1792), the U.S. Circuit Court, including Chief Justice John Jay, struck down a Rhode Island debt-relief measure. See Ely, *The Contract Clause* 22–27; *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. 304 (Cir. Ct. Penn. 1795) (Paterson, J.) (treating land grant as a contract which state could not later abrogate).

Moreover, many states included a Contract Clause based on the federal model as they either revised or adopted their constitutions. This development signaled broad acceptance of the constitutional norm protecting agreements from state interference. Thus, the potential for a full and natural reading of the Contract Clause was established well before this Court first addressed the question in 1810.

As is well known, Chief Justice John Marshall recognized that the Contract Clause was intended to be a secure base for the protection of both private and public contracts against retroactive state infringement. Indeed, the Contract Clause was the centerpiece of Marshall Court jurisprudence. This was exemplified by a series of landmark cases: *Fletcher* v. *Peck*, 10 U.S. 87 (1810) (state land grant was a contract within the purview of the Contract Clause, and an attempt to rescind the grant violated the Constitution); *New Jersey* v. *Wilson*, 11 U.S. 164 (1812) (state grant of tax immunity was a protected contract); *Dartmouth College* v. *Woodard*, 17 U.S. 518 (1819) (corporate charter was a constitutionally protected contract); *Sturges* v. *Crowninshield*, 17 U.S. 122 (1819) (state statute purporting to discharge prior debts was invalid under Contract Clause).

In these cases, Marshall established two cardinal principles – that the Contract Clause embraced both contracts by states and agreements between private parties, and that the reach of the Contract Clause was not confined to those controversies existing at the time of the framing. Indeed, he broadly observed: "The

convention appears to have intended to establish a great principle, that contracts should be inviolate." So high was Marshall's regard for the Contract Clause that he characterized Article I, section 10 as a "bill of rights for the people of each state." Ely, *The Contract Clause*, 30–58.

In the antebellum years after Marshall left the bench, the Court continued to vigorously enforce the Clause. For example, in the leading case of *Bronson* v. *Kinzie*, 42 U.S. 311 (1843), the Court invalidated Illinois debt relief measures which altered the remedies available to a mortgagee to foreclose on property in default. The Court pointed out that these laws imposed new and onerous conditions on the mortgagee. More importantly, the Court endorsed the purpose behind adoption of the Contract Clause in sweeping language:

> It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union by placing them under the protection of the Constitution of the United States.

Id. at 318. *Bronson* guided subsequent decisions regarding debt-relief laws until the 1930s.

Although the Court ruled in the famous case of *Charles River Bridge* v. *Warren Bridge*, 36 U.S. 420 (1837) that corporate charters should be strictly construed to bar claims of implied privilege, the Court never questioned the fundamental premise that state-granted charters were contracts within the purview of

the Constitution. The Court, for instance, invalidated state laws regulating banks as violative of the Contract Clause. Even more significant was a line of decisions upholding tax exemptions contained in charters as protected by the provision. See Ely, *The Contract Clause* 81–86.

The same pattern of robust enforcement continued into the postbellum decades. In the aftermath of the Civil War many southern states, facing widespread devastation, enlarged the amount of homestead exemptions from the reach of creditors and sought to apply the increased exemptions retroactively to antecedent debts. This Court firmly insisted that such laws, as applied to prior obligations, ran afoul of the Contract Clause. Justice Noah Swayne explained: "No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice." *Edwards* v. *Kearzey*, 96 U.S. 595, 603 (1877). In reaching this conclusion the Court not only implicitly rejected financial hardship as a justification for abridging agreements, but also stressed the significance of contractual stability for society at large.

In the late nineteenth century the Court invoked the Contract Clause to uphold tax exemptions, to bar legislative schemes to repudiate municipal debts, and to prevent lawmakers from changing foreclosure procedures for preexisting mortgages. Ely, *The Contract Clause*, 135–141, 150–151, 167–171, 177–184. Prominent jurists celebrated the importance of the provision.

Justice William Strong, speaking for the Court in *Murray* v. *Charleston*, proclaimed:

> There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away.

96 U.S. 432, 448 (1877).

Even jurists who sometimes disputed the applicability of the Contract Clause in particular cases nonetheless went out of their way to express their respect for the provision. Justice Samuel F. Miller expressed this attitude in his dissent in *The Washington University* v. *Rouse*:

> We are also free to admit that one of the most beneficial provisions of the Federal Constitution, intended to secure private rights, is the one which protects contracts from the invasion of State legislation. And that the manner in which this court has sustained the contracts of individuals has done much to restrain the State legislatures, when urged by the pressure of popular discontent under the sufferings of great financial disturbances, from unwise, as well as unjust legislation.

75 U.S. 439, 442 (1869) (Miller, J., dissenting).

Throughout the first hundred years of the Contract Clause, this Court's dedication to the inviolability

of contracts was unwavering. The only difficult questions concerned whether certain kinds of legislative enactments could be regarded as contracts and whether modifying breach-of-contract remedies constituted an impermissible impairment.

B. Starting in the late nineteenth century, this Court began to create problematic exceptions to the Contract Clause which virtually eliminated it from the Constitution.

By creating a number of exceptions to the Contract Clause, this Court not only moved away from the original understanding of the Clause but also undermined its efficacy. Foremost among these exceptions was the affirmation of an unalienable police power, which states could not bargain away by entering into contracts with private parties.

Although the police power is not mentioned in the Constitution, no one doubts its existence. Initially the police power was understood to encompass measures that directly advanced the public health, safety, or morals. Over time, however, courts expanded the police power far beyond its original scope, to encompass any measures that arguably advanced an open-ended conception of public welfare. Courts generally held that legislatures could not bargain away the police power by entering contracts, and they even began to hold that agreements between private parties contained implied terms recognizing the state's police power. As the scope of the police power grew, it had the potential to

override both private and public contracts, swallowing the Contract Clause. Ely, *The Contract Clause* 160–167.

The emergence of a boundless police power was compounded by heavy judicial deference to legislative determinations of the public welfare. See *Manigault* v. *Springs*, 199 U.S. 473, 480–481 (1905) (holding that the police power "is paramount to any rights under contracts between individuals," and noting that "there is wide discretion on the part of the legislature in determining what is and what is not necessary, – a discretion that courts ordinarily will not interfere with"). In short, this Court came close to saying that state lawmakers, notwithstanding the seemingly absolute language of the Contract Clause, could impair contracts whenever they could come up with a reason for doing so.

This ability of legislators to rely on assertions of the police power to circumvent the Contract Clause was reinforced by judicial acceptance of the emergency character of legislation as a justification to abridge contracts. This was illustrated by the rent control cases arising from World War I. This Court upheld the imposition of rent control on existing leases as a response to emergency housing conditions, brushing aside the contention that an emergency did not empower lawmakers to nullify leases. See *Block* v. *Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921). Justice Joseph McKenna, in dissent, perceptively asked whether other provisions of the Constitution might also be subordinated to the police power. *Block*, 256 U.S. at 170.

These developments culminated in the unfortunate decision in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934). There this Court, sharply divided, upheld a state moratorium on the foreclosure of mortgages during the Great Depression. This was the type of legislation routinely invalidated during the nineteenth century as a violation of the Contract Clause. Chief Justice Charles Evans Hughes, speaking for the Court, took this occasion to reformulate the principles governing Contract Clause cases. He enigmatically declared: "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Id.* at 426. Hughes maintained that the prohibition of the Contract Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Id.* at 428. He further insisted that the Clause "must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them." *Id.* at 443.

In short, Justice Hughes cut the Contract Clause loose from both the constitutional text and the views of the framers. Arguing that the economic interests of a state might justify interference with contracts, Hughes declared that infringement of contracts would pass constitutional muster if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* at 438. This converted the determination of Contract Clause violations into an uncertain balancing test. Writing for the dissenters, Justice George Sutherland maintained that

economic distress did not provide a basis for ignoring the Contract Clause and warned that *Blaisdell* opened the door to further encroachments upon the sanctity of contracts. Ely, *The Contract Clause* 220–226.

As Sutherland feared, *Blaisdell* delivered a near-fatal blow to the Contract Clause. This Court in effect gutted the provision as a guarantee of agreements, and relegated it to the periphery of constitutional law. Review of contract cases became perfunctory. After 1941 this Court did not overturn any state law on Contract Clause grounds for 35 years. Indeed, the Clause virtually disappeared from this Court's docket for decades. Little wonder that courts and commentators largely ignored this seemingly moribund provision.

In a pair of decisions in the mid-1970s, however, this Court recalled the Contract Clause from hibernation. First, in *United States Trust Company* v. *New Jersey*, this Court struck down a New Jersey statute that, the Court found, had purported to abrogate an agreement to which the state itself was a party. 431 U.S. 1 (1977). The Court's decision was premised primarily on the potential for abuse when a state could excuse itself from its own "purely financial" obligations. *Id.* at 25. Notwithstanding the narrow grounds for the decision, the Court still found it necessary to deny that "the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory." *Id.* at 16.

One year later, this Court issued its last opinion invalidating a statute on Contract Clause grounds.

Allied Structural Steel Company v. *Spannaus* concerned a Minnesota statute requiring, essentially, that when a business closes an office in Minnesota it must provide pension benefits to employees who had worked at the office for ten or more years, regardless of whether their benefits had vested under the terms of the pension plan. 438 U.S. 234, 241 (1978). It would be difficult to imagine a more quintessential attempt to rewrite an existing contract to favor one class of people at the expense of another. Nevertheless, in striking the statute down, Justice Potter Stewart, writing for the Court, still saw the need to affirm that the Clause "remains part of the Constitution. It is not a dead letter." *Spannaus*, 438 U.S. at 241. Such defensive language, particularly in such an egregious case, speaks volumes about the diminished standing of the Contract Clause in this Court's jurisprudence.

Unfortunately, these declarations about the continuing vitality of the Contract Clause were not matched by meaningful actions. The decisions themselves were narrow and confusingly reasoned, and the Court soon abandoned any attempt to reinvigorate the Clause. Instead, this Court formulated an ambiguous multipronged test, heavily weighted in favor of state authority, that fell woefully short of providing a principled basis on which to restore the Clause to its historic role as a safeguard of existing contracts. Ely, *The Contract Clause*, 241–247. The Court's current Contract Clause test asks:

1) whether a law causes a "substantial impairment" of contract rights;

2) if so, whether the law serves a "significant and legitimate public purpose," such as "the remedying of a broad and general social or economic problem";

3) and, finally, whether the means of serving that purpose are "reasonable" and "appropriate." In determining reasonableness, the Court stressed heavy deferenceto legislative justifications.

Energy Reserves Grp. v. *Kansas Power & Light Co.*, 459 U.S. 400, 412–413 (1983). This modern formulation of the Contract Clause has little in common with the Clause that the Framers drafted, that the states ratified, and that this Court faithfully enforced for the first century of this Nation's history. Instead, it appears an effort substitute a radically different understanding of the protection of contracts for that expressed in the Constitution.

C. This case presents an opportunity to correct this Court's Contract Clause jurisprudence.

This Court's current balancing test for Contract Clause violations cannot be squared with either the original understanding of the Clause or its purpose. Indeed, in *Blaisdell*, Justice Hughes blithely admitted that he was not interested in what the Contract Clause meant at the time of ratification. 290 U.S. at 442 ("It is no answer to say that this public need was not

apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."). Instead, he insisted that "growing recognition of public needs and the relation of the individual right to public security" justified reading the Clause narrowly. *Id.* at 443–444.

Later decisions of this Court have further weakened the balancing approach in *Blaisdell* – most significantly by removing the qualification that contracts be abrogated only for emergencies and only for limited time periods. See *Spannaus*, 438 U.S. at 249 n.24. This Court's most recent decisions have largely followed *Blaisdell*'s anti-originalist reasoning. See *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 186, (1992) ("Article I, § 10, of the Constitution provides: 'No State shall . . . pass any . . . Law impairing the Obligation of Contracts.' * * * Generally, we first ask whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' "); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 502 (1987) ("[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."). If anything, this Court has strayed even further from the Framers' intent.

The current, three-factor test asks whether a statute creates a "substantial" and "unreasonable" interference with contract rights and, essentially, whether the legislature seemed to have any reason, however contrived, for abrogating contracts. This test would have astonished John Marshall, who had found that

the words of the Contract Clause "are express, and incapable of being misunderstood." *Sturges* v. *Crowninshield*, 17 U.S. 122, 198 (1819). He explained that "the inviolability of contracts * * * was to be protected in whatsoever form it might be assailed." *Id.* at 200. There was no reason, he wrote, for the Framers to "enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all[.]" *Ibid.*

Yet, since *Blaisdell*, this Court has rejected this original understanding and plain meaning of the Contract Clause. It has done so, not through any process that could be called interpretation – for, as Marshall said, the Clause could hardly be any clearer – but because the Court concluded that the Clause was inconsistent with the "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." *Blaisdell*, 290 U.S. at 442.

This Court's re-writing of the Contract Clause in *Blaisdell* was especially misguided because it was based on a false premise – that the Great Depression constituted an "economic emergency" and that the legislature's "need" to "reasonabl[y]" abrogate contracts could not have been foreseen by the Framers. Yet as discussed above, nothing could be further from the truth. The major impetus for the Constitutional Convention was, in fact, the economic emergency of the post-Revolution years. See *Blaisdell*, 290 U.S. at 454, 467. Against this backdrop, states passed a variety of debtor relief laws, and it was precisely these kinds of measures that were the most immediate target of the

Contract Clause. And for over 100 years, this Court faithfully applied the Contract Clause throughout periods of economic turmoil and distress.

So even if "changed circumstances" were a legitimate justification for abandoning the original meaning of the Constitution, there were, in fact, no changed circumstances in the early twentieth century. If the Framers had been alive in 1934, they would doubtless have been surprised at many things, but one thing that would not have surprised them in the least would have been an economic downturn, accompanied by legislative efforts to rewrite contracts.

Another reason that this Court should return to its pre-*Blaisdell* interpretation of the Contract Clause is that the current test is hopelessly indeterminate, providing very little guidance to courts and litigants. Instead of a complete and unambiguous prohibition, the Court has now held that the Contract Clause bars only "substantial" and "unreasonable" interference with contract rights. This flexible inquiry introduces the very ad hoc "perplexity" that Justice Marshall said the Clause was intended to avoid. *Sturges*, 17 U.S. at 200.

The shortcomings of flexible, multi-pronged tests are well known, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989), and the criticisms apply with full force here. Yet it is sadly ironic that the Court has fashioned such an amorphous test for the Contract Clause – the one constitutional provision that, more than any other, was

designed to ensure stability and predictability in commercial relationships.

The Court should return to its pre-*Blaisdell* jurisprudence and hold, like John Marshall, that contracts are "inviolable," and that it is irrelevant whether a legislature's attempt to abrogate a contract is "reasonable," whether the abrogation is "substantial," and whether the abrogation is for a good reason. Under the Contract Clause as originally understood, and as applied by this Court for over 100 years, there can be no doubt that Minnesota's statute impermissibly impairs the obligations of contract.[4]

D. Even if this Court declines to revisit *Blaisdell* and subsequent decisions, the decision below should be affirmed.

The current, three-factor balancing test has many faults, but it is not (yet) completely toothless. And as Respondent demonstrates, Br. 33–60, the Minnesota statute at issue fails all three prongs. One point, however, merits particular emphasis: The governmental interest that this statute supposedly serves is astonishingly slight.

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[4] Petitioners argue that the Contract Clause should not be construed to reach this contract because the Framers' primary concern was with retroactively altering debtor-creditor relations. Pet. Br. at 61–63. The entire history of the Contract Clause refutes this contention. As John Marshall recognized, the words of the Contract Clause "are general and are applicable to contracts of every description." *Fletcher* v. *Peck*, 10 U.S. 87, 137 (1810).

As Petitioners repeatedly emphasize, the Minnesota statute does not prevent policyholders from changing their designated beneficiaries after they are divorced. The statute's only purpose, therefore, is to protect some subset of divorced individuals who would not want their ex-spouses to be the beneficiaries of their policies but who forgot or could not be bothered to change the designation on their policies. The interests of this subset of individuals is prioritized against the interests of another group: policyholders who want to retain their ex-spouses as beneficiaries but who are unaware that the law has subsequently changed. Petitioners argue that "the legislature made the empirical determination that" the latter group is smaller than the former. Br. at 57. But that claim is totally unsupported. Although the question is certainly susceptible of empirical analysis, there is no indication that the legislature – or, more accurately, the National Conference of Commissioners on Uniform State Laws that drafted the model rule – ever made an empirical determination.

Moreover, there is serious reason to doubt that the average divorcing policyholder would no longer wish for his or her ex-spouse to be the beneficiary of the policy. The primary purpose of life insurance is to provide financial security to families, and especially dependent children, in the event that a breadwinner dies unexpectedly. The need for such security does not disappear because of divorce.

At bottom, Petitioners' argument implies that evidence is unnecessary and that even an implausible hypothetical rationale is sufficient to demonstrate a "public purpose" that justifies rewriting existing contracts. There is nothing in this Court's precedents supporting such a meaningless standard of review. To the contrary, the cases repeatedly emphasize that there must be a "significant and legitimate public purpose behind the regulation." *Energy Reserves Grp.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *accord Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987) (holding that preventing obvious environmental harm is a "significant and legitimate public purpose").

In order to rule for Petitioners here, this Court would have to hold that courts have no business enquiring whether the legislature is advancing a genuine public purpose when it enacts legislation that directly alters the core subject matter of preexisting contracts. Such a ruling would go beyond anything this Court has done before, and it would signify the final nail in the Contract Clause's coffin. Even if the Court declines to revisit *Blaisdell* in this case, at the very least, it should hold the line.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted.

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No. 16-1432

IN THE

Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

Petitioners,

v.

KAYE MELIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE WOMEN'S LAW PROJECT, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, ATLANTA WOMEN FOR EQUALITY, A BETTER BALANCE, CALIFORNIA WOMEN'S LAW CENTER, FEMINIST MAJORITY FOUNDATION, GENDER JUSTICE, LEGAL MOMENTUM, LEGAL VOICE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, PENSION RIGHTS CENTER, SOUTHWEST WOMEN'S LAW CENTER, AND WOMEN'S INSTITUTE FOR A SECURE RETIREMENT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici are fourteen organizations dedicated to the promotion of gender equality and the advancement of social and economic opportunity for women and girls. Several *amici* hail from a particular region or state. Many are national in scope. All of them share a common belief—that persistent disparities in societal and economic power between women and men, which have been perpetuated in part by effectively discriminatory public policies, can and must be neutralized.

Amici are committed to finding solutions to the various financial challenges that women uniquely face. They are engaged in numerous initiatives toward that end, including legal advocacy, public outreach and education, individual counseling, and policy research.

The *amici* filing this brief are: The Women's Law Project, American Association of University Women, Atlanta Women for Equality, A Better Balance, California Women's Law Center, Feminist Majority

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[1] Counsel for Petitioners and Respondent have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

Foundation, Gender Justice, Legal Momentum, Legal Voice, National Partnership for Women & Families, National Women's Law Center, Pension Rights Center, Southwest Women's Law Center, and Women's Institute for a Secure Retirement. Individual statements of interest of *amici* are attached as an Appendix.

* * *

In addition to filing this brief, several *amici* also filed a brief in support of the petition for certiorari in *Lazar v. Kroncke*, *petition for cert. pending*, No. 17-521 (filed Oct. 3, 2017). Like the instant case, *Lazar* concerns whether the retroactive application of state revocation-on-divorce statutes violates the Contract Clause.[2] The primary difference is the type of contract at issue—the beneficiary designation in *Lazar* concerned an individual retirement account, whereas this case involves the beneficiary of a life insurance policy. The *Lazar* petition is pending, and its disposition may be determined by the outcome of this case.

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[2] U.S. Const., art. I, § 10, cl. 1.

SUMMARY OF ARGUMENT

Automatic revocation-on-divorce (ROD) statutes, like the Minnesota statute at issue here,[3] are legislative decisions about "the identity"[4] of who should receive certain personal property—specifically, a decedent's non-probate assets such as the proceeds of a life insurance policy or individual retirement account (IRA).[5] ROD statutes exist in at least 26 states[6] and are predicated on the notion that

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[3] Minn. Stat. Ann. § 524.2-804.

[4] Pet. Br. 4, 13, 30, 31, 33, 39, 40.

[5] The non-probate assets affected by ROD statutes also can include the proceeds of annuities, revocable inter-vivos trusts, and other transfer-on-death accounts or benefits.

[6] Pet. Br. 8-9 nn.1-2 (collecting statutes). Fifteen states (including Minnesota) modeled their ROD statutes on Section 2-804 of the Uniform Probate Code (UPC), which, *inter alia*, "revokes any revocable . . . disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument" automatically upon a divorce, "[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate . . . ." Unif. Probate Code § 2-804(b)(1)(A). Other states have enacted ROD statutes that depart from the UPC model to varying degrees. *See, e.g.*, Cal. Prob. Code § 5040(e) (excluding life insurance from ROD provision); Mo. Rev. Stat. §§ 461.051, 461.073(6) (same); 20 Pa. Stat. and Cons. Stat. Ann. § 6111.2 (revoking beneficiary designations "unless it appears the designation was intended to survive the divorce based on" certain evidence).

an ex-spouse is presumptively an inappropriate recipient of such assets.

On their face, modern ROD statutes appear gender neutral: they apply to ex-husbands just as they apply to ex-wives. Their history, however, is not benign. Earlier versions of ROD-like statutes revoked only a wife's beneficiary status while leaving a husband's status in place.[7] That discriminatory legacy lives on today because ROD statutes, as applied in the real world, significantly and disparately harm women, who are less likely than men to hold sufficient assets for a stable retirement. Consequently, an unplanned revocation of benefits

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[7] *See, e.g.*, 1939 Mich. Pub. Acts No. 220 (codified at Mich. Comp. Laws Ann. § 552.101) (requiring that "every decree of divorce shall determine all rights of the *wife* in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the husband in which she was named or designated as beneficiary" *and* "that unless otherwise ordered in said decree such policy or contract shall thereupon become and be payable to the estate of the *husband* or to such named beneficiary as he shall affirmatively designate") (emphasis added); *McCoy v. McCoy*, 27 N.W.2d 62, 64 (Mich. 1947) (applying statute to order payment of insurance proceeds to husband's estate); *Minn. Mut. Life Ins. Co. v. Hendrick*, 25 N.W.2d 189, 191 (Mich. 1946) (same); 1982 Mich. Pub. Acts No. 184 (amending statute to be gender neutral: "[i]f the decree of divorce does not determine the rights" of a surviving ex-wife *or ex-husband* then the policy shall be payable to the estate of the decedent) (emphasis added).

for a divorced woman can—and often does—lead to particularly dire financial consequences.[8]

Although commentators supporting ROD statutes contend there is "no federal policy favoring wealth transfer to ex-spouses,"[9] it is also true that the "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."[10] And under the Contract Clause, "[l]egislative perception regarding the more worthy recipient does not render a complete divestiture of contractual rights a legitimate state interest."[11] Indeed, Petitioners acknowledge that the Court must take into account certain "practical considerations" in determining

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[8] Of course, civil marriage is no longer exclusively heterosexual. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The retroactive application of ROD statutes, however, disproportionately impacts former wives of men, due to a variety of circumstances that are addressed in this brief.

[9] John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases:* Hillman *Doubles Down on* Egelhoff, 67 Vand. L. Rev. 1665, 1666 (2014).

[10] *Califano v. Webster*, 430 U.S. 313, 316–17 (1977); *see Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977) ("redressing our society's longstanding disparate treatment of women" is a "permissible" state purpose).

[11] *In re Workers' Comp. Fund*, 46 F.3d 813, 821 (8th Cir 1995).

whether to uphold ROD statutes, such as whether they "protect divorcing wives from financial harm" and whether they "significantly alter asset distribution in divorce."[12] Because ROD statutes disparately harm women who marry, they apply a one-size-fits-all rule that penalizes a woman's choice to marry just as increasingly diverse and individualized non-marital relationship patterns are expanding. The fact that ROD statutes, as applied, disproportionately strip benefits from divorcing wives weighs against their validity under the Contract Clause.

"A person's testamentary intent is the polestar that must guide all those responsible for effectuating a person's estate plan."[13] ROD statutes like Minnesota's, however, are inherently ill-suited to effectuating intent. They apply automatically to disinherit all ex-spouses regardless of contrary indications of intent.

The "polestar" for ROD statutes thus has little, if anything, to do with intent. Instead, ROD statutes are guided by an unfounded, outmoded assumption that "[d]ivorce usually represents a stormy parting, where the last thing one of the parties wishes is to

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[12] Pet. Br. 26-27.

[13] Am. Coll. of Trust and Estate Counsel *Amicus* Br. 2.

. . . giv[e] everything to the former spouse."[14] In Petitioners' estimation, a blanket policy founded on that assumption will, "in the mine run of cases," yield the correct result.[15] But Petitioners' blind faith in this assumption is belied by recent developments in the nature of divorce and ex-spousal relationships—not to mention the numerous decisions by state courts and legislatures which have recognized significant reasons why a divorced individual might want to maintain an ex-spouse as a beneficiary.

Of course, states may enact misguided laws so long as they comport with the Constitution. Here, however, Minnesota's ROD statute applies *retroactively*, such that it nullifies beneficiary designations made pursuant to valid contracts executed before the statute was enacted. Under the Contract Clause, if a state regulation substantially impairs a pre-existing contractual obligation, it is unconstitutional unless it (1) seeks to achieve a "significant and legitimate public purpose"; and (2) is based on "reasonable conditions" and is "of a

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[14] Langbein, *supra* note 9, at 1669 n.14 (quoting Raymond H. Young, *Probate Reform*, 18 Bos. B.J. 7, 11 (1974)).

[15] Pet. Br. 57.

character appropriate to the purpose justifying [its] adoption."[16]

Retroactive ROD statutes fail this test. They rewrite an essential term of contracts pertaining to descendable non-probate assets—the beneficiary designation—and thus severely, if not totally, impair the rights and obligations of contracting parties.[17] In light of the severity of this impairment, which is described at length in Respondent's brief, ROD statutes cannot be saved under a state justification theory for two principal reasons.[18]

First, there is no significant and legitimate public purpose that justifies applying ROD statutes retroactively. ROD statutes' purported public purpose—to vindicate a divorced individual's *presumed* intent—derives from an inaccurate and obsolete conception of divorce. ROD statutes are also founded on fundamentally contradictory assumptions and cause needless legal complexity.

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[16] *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1982).

[17] *See Parsonese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 818 (Pa. 1998).

[18] *See* Resp. Br. 33-52. In light of Respondent's detailed discussion of impairment, this brief focuses on the deficiencies in purported state justifications for ROD statutes.

Second, retroactively applying ROD statutes is neither a reasonable nor an appropriate means of effectuating a decedent's intent. Even if the Court were to agree with Petitioners that these statutes produce some marginal benefit in "vindicating presumed intent,"[19] any benefit is overwhelmingly outweighed by the significant and disparate harm ROD statutes cause to women. Moreover, the states have available several other approaches that, when compared to ROD statutes, are both more likely to effectuate intent and less destructive of existing contractual rights and obligations. Accordingly, to the extent they apply retroactively, ROD statutes like Minnesota's violate the Contract Clause.

ARGUMENT

This Court has recognized that "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[20] Thus, if a state regulation constitutes a "substantial impairment" of a contractual relationship, the regulation will survive judicial

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[19] Pet. Br. 2, 16, 47, 48, 57, 59.

[20] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) (emphasis in original).

scrutiny only if two conditions are met. *First*, "the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem."[21] *Second*, the regulation "must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[22]

Retroactive ROD statutes like Minnesota's fall short of this standard. They are neither adequately justified by a legitimate public purpose, nor sufficiently tailored to their purported rationale. Instead, they unnecessarily threaten the financial and retirement security of millions of divorced women for little public benefit. Accordingly, these statutes violate the Contract Clause.

I. REVOCATION-ON-DIVORCE STATUTES DISPARATELY HARM WOMEN

As Petitioners recognize, the practical implications of the statute at issue impact the Court's Contract Clause analysis.[23] For this reason, it is important for the Court to consider the

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[21] *Energy Reserves Grp.*, 459 U.S. at 411-12.

[22] *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

[23] *See* Pet. Br. 25-28, 35-38.

significant and disparate impact ROD statutes have on women.

The primary effect of ROD statutes is to revoke beneficiary designations for non-probate assets like life insurance policies and IRAs—assets that women are less likely to hold than men, and hold in substantially smaller amounts. Thus, in reality, these statutes revoke the beneficiary status of *far more* ex-wives than ex-husbands and with *far greater* financial harm to ex-wives when they do. Moreover, ROD statutes apply at a moment when women are in a particularly vulnerable financial position—after a divorce. As a result, ROD statutes more often have a financially devastating impact on divorced women than they do on divorced men.

A. Revocation-on-divorce statutes more frequently revoke beneficiary designations of women, and deprive women of larger benefits than men

Although ROD statutes appear gender neutral on their face, the assets that they target are unevenly distributed between men and women. This leads to effects that are considerably skewed—ROD statutes affect the disposition of assets that would have gone to benefit an ex-wife more often and in greater amounts than they affect ex-husbands.

Take, for example, the asset at issue in this case: life insurance. As of 2016, 56% of women had life

insurance coverage compared to 62% of men.[24] Even as recently as 2010, the gap was smaller—57% for women and 61% for men.[25] Thus, the disparity is increasing. And among the women who *do* have life insurance, the dollar amount of their coverage is on average between 22% and 31% less than what men have.[26] These disparities hold true for women of all ages and even for women with high personal incomes.[27] Their significance is magnified by the enormous size of the life insurance industry: Americans' individual life insurance coverage totaled some $12.3 trillion in 2015.[28] Thus, even a one

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[24] *LIMRA: Women Still Lag Men in Life Insurance Ownership*, LIMRA (Nov. 16, 2016), https://goo.gl/WX78Ef.

[25] *Id.*

[26] *Id.* (the amount of coverage men purchase is on average $206,357, whereas women purchase only $160,782); *Facts About Life 2011*, LIMRA (Sept. 2011), https://goo.gl/CVmp6o ("On average, women have $129,800 of individual life insurance, while men have $187,100 of individual life insurance coverage.").

[27] *Facts About Life 2011*, *supra* note 26 ("Women of all ages average smaller amounts of individual life coverage than men of similar ages . . . Women with high personal incomes ($100,000+) are less likely to have individual life insurance or group life insurance than men with similar personal incomes.").

[28] Am. Council of Life Insurers, *Life Insurers Fact Book 2016*, at 63, 66 tbl.7.1 (2016), https://goo.gl/9hvS5W.

percent differential in coverage amounts leads to a disparity in holdings of over $120 billion.

Similar trends exist for other non-probate assets affected by ROD statutes, such as IRAs. Multiple studies have shown that men's average IRA holdings are anywhere from 41% to 115% higher than women's.[29] According to one analysis of 2012 data, while the median IRA account balance for men age 70 and older was $102,097, the median account balance for similarly aged women was $56,371—an 81% difference. Life insurance disparities are also relevant to retirement income security—52% of life insurance owners list supplementing retirement income as a reason for purchasing life insurance.[30]

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[29] *See* Craig Copeland, *Individual Retirement Account Balances, Contributions, and Rollovers, 2012; With Longitudinal Results 2010–2012: The EBRI IRA Database*, EBRI Issue Brief No. 399, at 7 (May 2014), https://goo.gl/dH8221 ("Males had higher individual average and median balances than females: $139,467 and $36,949 for males, respectively, vs., $81,700 and $25,969 for females . . . Across all ages, males had both higher individual average and median balances than females . . . ."); Jennifer Erin Brown et al., Nat'l Inst. on Ret. Sec., *Shortchanged in Retirement: Continuing Challenges to Women's Financial Future*, at 9-10 (Mar. 2016), https://goo.gl/gr5o6t (on average, women saved less than men in their IRAs, with an average account balance for men of $56,429, which is 115% larger than the average of $26,307 for women).

[30] Life Happens & LIMRA, *2017 Insurance Barometer Study* 7, 20 (2017), https://goo.gl/wkV83U.

Women express consistently higher levels of financial concern than men when it comes to savings, retirement security, and health-related expenses.[31] This is hardly surprising because women face a financial catch-22 as they age—they tend to have fewer resources but higher costs.

There are a number of reasons why women tend to have fewer resources as they age. Women face income inequality throughout their working lives, both during their careers and in retirement.[32] Women also spend more time out of the workforce in caregiving roles—for both children and elder family members—leading to even greater disparities in lifetime earnings.[33] Moreover, while the gap has

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[31] *Id.* at 16.

[32] Mikki D. Waid, AARP Pub. Pol'y Inst., *An Uphill Climb: Women Face Greater Obstacles to Retirement Security* 1 (2013), https://goo.gl/tdU79o; U.S. Cong. Joint Econ. Comm. Chairman's Staff, 112th Cong., *The Gender Wage Gap Jeopardizes Women's Retirement Security* 2 (2011), https://goo.gl/KnQpt9 ("Lower earnings over the course of their careers jeopardize women's retirement security."); Women's Inst. for a Secure Ret., *The Pay Gap's Connected to the Retirement Gap* (2017), https://goo.gl/gRTfpx.

[33] Waid, *supra* note 32, at 1 (women take an estimated 12 years out of the work force as a result of caregiving); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 Berkeley J. Emp. & Lab. L. 351, 360, 370-71 (2004) (women provide approximately 70% of all unpaid elder care, and 16% of employed caregivers quit their jobs, 38% take

narrowed considerably in recent decades, women are still less likely to be eligible for employer-sponsored retirement plans, largely due to a higher incidence of part-time employment.[34]

Additionally, women have significantly greater lifetime financial needs than men. On average, women live two to five years longer than men.[35] Consequently, women are more likely than men to live alone in old age. [36] Women also make up 70% of

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time off, and 21% work fewer hours, which has "particularly harmful implications for women").

[34] Brown et al., *supra* note 29, at 7-8 ("In 2014, the rate of part-time employment was twice as high among women as men (66.1% vs. 33.9%, respectively). . . . The higher rate of part-time employment among women is a large factor in their lower eligibility rates for employer-sponsored retirement plans, as they may not work enough hours to be covered by their employers' plans."); Waid, *supra* note 32, at 1 ("U.S. Census Bureau data show that the majority of women who were not eligible to participate in their employer's pension plan stated that it was because they did not work enough hours, weeks, or months per year at their place of employment.").

[35] Ctrs. for Disease Control & Prevention, U.S. Dep't Health & Human Servs., Nat'l Vital Statistics Rep. No. 65-04, *Deaths: Final Data for 2014*, at 7 (2016), https://goo.gl/ajNgH4 ("In 2014, the difference in life expectancy between the sexes was 4.8 years."); *see* Waid, *supra* note 32, at 1 ("A 65-year-old woman can expect to live 2 years longer than a 65-year-old man.").

[36] *See* Waid, *supra* note 32, at 1; Leslie Bennetts, *Census Data Reveals Elder Women's Poverty Crisis*, The Daily Beast (Mar. 28, 2012), https://goo.gl/8uqum3 ("Over the age of 85, 60 percent

the nursing home population and generally incur higher medical costs.[37] According to one recent analysis, due to the longevity difference and the rising cost of health care, the average 45-year-old woman today can expect to incur $966,952 in medical expenses during her retirement, which is $208,559 (27.5%) more than the average 45-year-old man ($758,393).[38]

B. Revocation-on-divorce statutes disparately affect financially vulnerable divorced women

The gender inequality in resources and retirement security leaves women in a particularly precarious financial position compared to men. And the situation is even worse for divorced women.

Divorce often leads to "substantial, negative effects on women's total household assets and income," which can result in "financially devastating"

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of men live with a spouse, but only 17 percent of women live with a spouse.").

[37] *See* Waid, *supra* note 32, at 1.

[38] HealthView Services, *The High Cost of Living Longer: Women and Retirement Health Care* 9 tbl.4 (2016), https://goo.gl/2AKwws.

consequences.[39] According to the Government Accountability Office, in 2010, women's income fell by 41% immediately following divorce—or nearly twice as much as men's income, which declined only 23%.[40]

These steep drop-offs in income often leave women in dire financial straits after divorce, particularly as they near retirement. The poverty rate among divorced or separated women over 65 is roughly 20%,[41] with some estimates as high as 37%.[42] In 2009, some 27% of women who had divorced within the previous 12 months were found

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[39] U.S. Gov't Accountability Office, GAO-12-699, *Retirement Security: Women Still Face Challenges*, 28, 46 (2012), https://goo.gl/9mwGp4.

[40] *Id.* at 83.

[41] *See* Barbara A. Butrica & Karen E. Smith, *The Retirement Prospects of Divorced Women*, 72 Soc. Sec. Bull. 11, 11 (2012) https://goo.gl/toxRtV ("around 20 percent of divorced women aged 65 or older live in poverty"); U.S. Soc. Sec. Admin., *Income of the Population 55 or Older, 2014*, at 312 tbl.11.1 (2016), https://goo.gl/8AgLr8 (in 2014, 18.4% of divorced women over age 65 lived below the poverty line compared to 12.8% of divorced men over age 65); Diana B. Elliott & Tavia Simmons, U.S. Census Bureau, *Marital Events of Americans: 2009*, at 9 tbl.2 (2011), https://goo.gl/dtwmmc (in 2009, 21.5% of women who had divorced in the past 12 months had incomes at or below the poverty line, compared to 10.5% of men).

[42] Sandra Yin, *Older Women, Divorce, and Poverty*, Population Reference Bureau (Mar. 2008), https://goo.gl/eb0OjC.

to have less than $25,000 in annual household income, compared with 17% of recently divorced men.[43] Thus, while women generally are more likely than men to run out of resources in retirement, the problem is even worse for divorced women.[44]

As a result, when ROD statutes apply, they may pull the financial rug out from under many women precisely when they are most vulnerable, thereby compounding their financial difficulties.

C. Revocation-on-divorce statutes penalize women's choice to marry

Because women are disparately harmed by ROD statutes in the ways discussed above, they incur an economic penalty for choosing to marry their partners rather than cohabiting or otherwise not formalizing their intimate relationships. ROD statutes apply only to former *spouses*; they do not apply to former partners who never married. Thus, a beneficiary designation for a woman who chooses to get married is revoked upon dissolution of the relationship, while a designation for a woman who does not marry remains in place. This puts former

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[43] Conor Dougherty, *Children of Divorce More Likely to Be Poor*, Wall St. J., Aug. 25, 2011, https://goo.gl/eeDFzw.

[44] *See* Yin, *supra* note 42.

unmarried partners in a superior economic position vis-à-vis former spouses.

Although the drafters of the UPC promoted ROD statutes as an answer to the so-called "multiple marriage society,"[45] their practical impact exacerbates the already-considerable "marriage penalty," which may contribute to the recent rise of non-marital relationships.[46] More and more Americans are choosing to have committed long-term relationships without marriage, as evidenced by the persistent decline in the national marriage rate and sharp increase in the rate of cohabitation.[47] Even

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[45] *See generally* Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683 (1992); *see Stillman v. Teachers Ins. & Annuity Ass'n Coll. Ret. Equities Fund*, 343 F.3d 1311, 1319 (10th Cir. 2003) ("Professor Waggoner's view is entitled to particular respect because of his prominent role in drafting the Uniform Probate Code as well as the imprimatur given his article by the Commentary to Uniform Probate Code § 2–804, which states that '[t]he theory of this section is discussed in [Waggoner's article].'").

[46] Betsey Sevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, 21 J. Econ. Persp. 27, 38 (2007) (the rise of cohabitation "may reflect a lower value of the institutional structure of marriage. . . . For instance, an increasing number of dual career couples combined with high marginal tax rates on secondary earners may face a 'marriage penalty,' while increasing social acceptance of cohabitation may have diminished social stigma").

[47] *See, e.g.*, Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should*

the UPC's drafters have recognized that the interaction of these relationship dynamics with traditional wealth-transfer laws is problematic, and that "economic circumstances may dictate or influence" a couple's decision to cohabitate rather than marry.[48]

The ROD marriage penalty is not theoretical—it is evidenced by cases where ex-wives were originally designated as beneficiaries while cohabiting.[49]

Unmarried Partners Acquire Marital Rights?, 50 Fam. L.Q. 215, 216-24 (2016); Richard Fry, *No Reversal of the Decline in Marriage*, Pew Research Ctr., (Nov. 20, 2012), https://goo.gl/abtPmR; Abigail Geiger & Gretchen Livingston, *8 Facts on Love and Marriage in America*, Pew Research Ctr. (Feb. 13, 2017), https://goo.gl/AxfKxD ("The number of Americans living with an unmarried partner reached about 18 million in 2016, up 29% since 2007.").

[48] Waggoner, *supra* note 47, at 229-30, 231-35.

[49] *Compare Ohio State Life Ins. Co. v. Garcia*, 2002 WL 31867906, at *1-3 (Ohio Ct. App. Dec. 24, 2002) (revoking ex-wife's beneficiary designation where she was designated prior to marriage) *with Ping v. Denton*, 562 S.W.2d 314, 315-16 (Ky. 1978) (noting the decedent designated his ex-wife as a life insurance beneficiary "at a time when they were not married" and "retain[ed her] as the beneficiary during the period of their marriage"; and affirming her entitlement to proceeds due to recent repeal of Kentucky statute that effectively revoked most beneficiary designations on divorce); *see Strachan v. Prudential Ins. Co. of Am.*, 73 N.E.2d 840, 843 (Mass. 1947) (collecting cases providing decedent could designate cohabiting partner as beneficiary of life insurance policy); *Metro. Life Ins. Co. v. Church*, 389 N.W.2d 124, 125 (Mich. App. 1986) ("before the decedent and Church were married, and before they even

Ironically, the one-sized-fits-all approach of the UPC (which penalizes a woman's choice to marry) has spread at the same time as an individualized approach is necessary in light of significant increases in the variety and complexity of long-term relationships.[50]

II. NO SIGNIFICANT AND LEGITIMATE PUBLIC PURPOSE JUSTIFIES APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY

To withstand scrutiny under the Contract Clause, a statute that substantially impairs a contractual relationship must be found to advance a "significant and legitimate" public purpose.[51] A statute that is "limited in effect to contractual obligations or remedies"[52] or which only "protect[s] . . . a narrow

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contemplated marriage, the decedent made Church the beneficiary of this life insurance policy. The insurance policy listed Church as a 'friend'.").

[50] *See* Waggoner, *supra* note 47, at 215, 229-30 (discussing "the cultural shift in the formation of families that has been taking place in this country" and acknowledging that "[n]o one-size-fits-all generalization explains why a certain percentage of cohabiting couples continue to cohabit without getting married").

[51] *Energy Reserves Grp.*, 459 U.S. at 411.

[52] *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983).

class"[53] will not pass muster.[54] To survive a challenge under the Contract Clause, the statute must impose "a generally applicable rule of conduct designed to advance 'a broad societal interest.'"[55]

A. Revocation-on-divorce statutes rely on an outmoded conception of ex-spousal relationships

The purported public purpose behind ROD statutes is inadequate because it derives from an obsolete, dubious assumption about the nature of divorce: that divorce is a "stormy parting where the last thing one of the parties wishes is to . . . giv[e] everything to the former spouse."[56]

The dubiety of that assumption has been recognized repeatedly. As the Eighth Circuit found in *Whirlpool Corp. v. Ritter*, while some individuals might prefer to change their beneficiary designations after a divorce, that preference is far from a

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[53] *Spannaus*, 438 U.S. at 249.

[54] *See* Resp. Br. 52-53.

[55] *Eagerton*, 462 U.S. at 191 (quoting *Spannaus*, 438 U.S. at 249).

[56] Langbein, *supra* note 9, at 1669 n.14.

"universal truth."[57] Surveying the facts of the case before it, the *Whirlpool* court noted that "[i]t is certainly plausible that [the deceased life insurance policyholder] was primarily concerned about the economic well-being of his ex-wife because she had custody of his four minor children and he wanted to insure her ability to provide for their welfare."[58] In light of this, it was "equally possible" that revoking the ex-wife's beneficiary status would "frustrate," rather than "effectuate," the policyholder's intent.[59]

State courts have reached similar conclusions.[60] In rejecting retroactive application of Pennsylvania's

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[57] 929 F.2d 1318, 1323 (8th Cir. 1991); *see e.g., Metro. Life Ins. Co. v. Melin*, 853 F.3d 410, 412 (8th Cir. 2017); *MONY Life Ins. Co. v. Ericson*, 533 F. Supp. 2d 921, 928 (D. Minn. 2008).

[58] *Whirlpool*, 929 F.2d at 1323.

[59] *Id.*

[60] *See, e.g., Hughes v. Scholl*, 900 S.W.2d 606, 607 (Ky. 1995) ("[T]here are often valid reasons why an insured would want a former spouse to receive his insurance policy proceeds" and decedent's "inaction might well indicate his intent not to effect a change."); *In re Estate of Rock*, 612 N.W.2d 891, 894-95 (Minn. Ct. App. 2000) (decedent intended former wife to remain as IRA beneficiary; the divorced couple "maintained an amicable relationship, and mutually agreed to retain each other as primary beneficiaries on their IRA accounts, retirement plans or equivalent cash accounts" and "cooperated well in raising their children"); *Daughtry v. McLamb*, 512 S.E.2d 91, 92 (N.C. Ct. App. 1999) ("[T]he decedent and [former wife] remained friends after their divorce and continued to maintain a joint

ROD statute, the Pennsylvania Supreme Court recognized that "[d]ivorce does not in all cases and automatically spell the end of interest in or even concern for one former spouse by the other," and that "to hold that forthwith upon divorce the husband must be presumed to intend to terminate a contractual arrangement which benefits the other is to engage in speculation."[61] In Missouri, the legislature opted to repeal the state's ROD statute as applied to life insurance, in part because "[i]n reality, many people get divorced and still want their insurance policy beneficiary to remain unchanged."[62]

The federal government has voiced agreement with this view as well. In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), which held that federal law preempts state revocation-on-divorce laws as applied to benefits governed by ERISA, the U.S. Solicitor General emphasized that "it cannot be assumed that a plan participant would necessarily have chosen to revoke the designation of the former spouse as

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checking account. . . . [N]o attempt [was] made during the decedent's lifetime to change the beneficiary. . . .").

[61] *Parsonese*, 706 A.2d at 818 (quoting *In re Adams' Estate*, 288 A.2d 514, 517 (Pa. 1972)).

[62] Nonprobate Transfers: Hearing on H.B. 644 Before the H. Comm. on Ins., 91st Gen. Assemb., Reg. Sess. (Mo. 2001) (summary of Richard Smreker, Sr. Leg. Analyst), https://goo.gl/Rs6yww.

beneficiary . . . A participant might, out of feelings of obligation, remorse, or continuing affection, intend that the former spouse remain as beneficiary" despite their divorce.[63]

Moreover, even if the assumption at the core of ROD statutes were once defensible, recent evolution in the nature of marriage and divorce have rendered it obsolete. The increasing prevalence and fluidity of relationships that do not fit into stereotypical molds dooms any attempt to create one-size-fits-all rules about the intentions underlying individuals' relationships and their economic manifestations.

Over recent decades, as divorce has become more commonplace[64] and as no-fault divorce has proliferated,[65] it is no longer the case that a couple's

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[63] Brief for United States as *Amicus Curiae* Supporting Petitioner, *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529), 2000 WL 1168615, at 23.

[64] Among adults ages 50 and older, the divorce rate more than doubled from 1990 to 2015. Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America's 50+ Population*, Pew Research Ctr. (Mar. 9, 2017), https://goo.gl/PP8G7o.

[65] Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 Fam. Rel. 317, 322-23 (2002). Additionally, several states have enacted "collaborative divorce" statutes and procedures, which give divorcing couples a less adversarial alternative to the traditional process of dividing marital assets. *See, e.g.*, N.J. Stat. Ann. § 2A:23D-2; Fla. Stat. Ann. § 61.55. Developments

decision to divorce is necessarily "stormy." Indeed, there has been a recent marked increase in post-divorce co-parenting relationships,[66] which refutes the assumption underlying ROD statutes that, in virtually every case, divorcing couples will want to completely sever economic ties. Even published case law regarding beneficiary designations shows the trend towards more amicable and cooperative divorce.[67] These societal developments confirm that

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like these show that divorce may be more frequent, but less contentious than it once was.

[66] *See* Maria Cancian et al., *Who Gets Custody? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 Demography 1381, 1387-88 (2014) (documenting a five-fold increase in equal shared custody arrangements in divorce cases from 1988-2008).

[67] *See, e.g.*, cases discussed in note 60 *supra*; *Nat'l Auto. Dealers & Assocs. Ret. Tr. v. Arbeitman*, 89 F.3d 496, 501 (8th Cir. 1996) (couple "maintained an amicable relationship," husband "provided more support to [his former wife] and the children than he was legally obligated" to provide and "did not change the beneficiary designation" on his pension plan); *Hadfield v. Prudential Ins. Co.*, 973 A.2d 387, 388 (N.J. Super. Ct. App. Div. 2009) (ex-wife whose beneficiary status was revoked contended her divorce from the decedent "had been amicable and that they had agreed that each would maintain the other as the beneficiary on their respective life insurance policies until either married, in which event the new spouse would be named as the beneficiary").

there is no such "reality," let alone "universal truth," underlying the enactment of ROD statutes.[68]

Furthermore, if the assumption behind ROD statutes were so clear-cut, and if vindicating that assumption were such an important societal interest, it is notable that no state—not even Minnesota—has filed a brief supporting Petitioners. The states' silence belies the position that the public purpose at issue here is "significant and legitimate."[69]

B. Revocation-on-divorce statutes are irrationally founded on contradictory assumptions about decedents' personal responsibility and create legal complexity

ROD statutes rest not only upon the unfounded assumption that one would not intend to maintain an ex-spouse as a beneficiary, but also that ex-spouses do not change their designations post-divorce due to "inattention" rather than a responsible decision.[70] ROD statutes therefore assume that policyholders who do not wish to maintain their ex-spouses as beneficiaries are irresponsible. That this concern is

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[68] *Whirlpool Corp.*, 929 F.2d at 1323; *see Parsonese*, 706 A.2d at 818-19.

[69] *See* Resp. Br. 58.

[70] *See Stillman*, 343 F.3d at 1318.

not a significant and legitimate public purpose is clear when considering that ROD statutes make the contradictory assumption that policyholders who *do* want to maintain their ex-spouses as beneficiaries are not only responsible, but legal experts. In order to maintain their already-expressed desire to designate their ex-spouse as a beneficiary, a policyholder must learn of the ROD statute, determine its retroactivity, and then remember to act affirmatively to re-designate the ex-spouse.

Even then, a diligent policyholder *still* may fail to redesignate an ex-spouse given the complexity of redesignation requirements in many insurance policies.[71] Indeed, determining what constitutes a valid redesignation is a complex issue of law in its own right—one that varies by jurisdiction and that likewise requires an unrealistic level of legal acumen on the part of insureds (and insurance company representatives) attempting to effectuate their intent

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[71] *See, e.g., Metro. Life Ins. Co. v. Gorman-Hubka*, 159 F. Supp. 3d 668, 673 (E.D. Va. 2016) (designation of ex-wife was automatically revoked under Virginia's ROD statute notwithstanding that insurance company's representative had told ex-husband that he did not need to do anything to reaffirm designation if ex-wife was already the beneficiary); *Sever v. Mass. Mutual Life Ins. Co.*, 944 S.W.2d 486, 489 (Tex. App. 1997) (verbal statements to insurance agent were not effective under the applicable policy provision to redesignate ex-spouse).

post-divorce.[72] This is only one of many issues that make ROD statutes more, not less, complicated than relying on a policyholder's express written beneficiary designation. It "is perfectly clear on its face when an ex-spouse is designated as the beneficiary; it becomes no simpler or clearer merely because the [state] legislature has opted to replace the individual designated as the beneficiary with someone else, by operation of law."[73]

Moreover, choice of law issues in ROD litigation can spawn legal complexity worthy of a law school exam, thereby adding to litigation costs and draining insurance and IRA assets.[74] These problems are

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[72] *See Am. Gen. Life Ins. Co. v. Jenson*, 2012 WL 848158, at *11-14 (D.S.D. Mar. 12, 2012) (discussing varying outcomes under different states' case law as to whether redesignation of ex-wife may be accomplished only in writing or also by other expressions of intent).

[73] *MONY*, 533 F. Supp. 2d at 928.

[74] *See e.g.*, *Lazar v. Kroncke*, 862 F.3d 1186, 1193 (9th Cir. 2017) (an "Arizona state court would disregard the [California] choice-of-law provision in the Plan and instead apply Arizona's ROD statute" where the "district court did not resolve whether the choice-of-law provision governed both the Plan and the Adoption Agreement, instead concluding that the choice-of-law provision was unenforceable under Arizona law"), *pet. for cert. pending*, No. 17-521 (filed Oct. 3, 2017); *Lincoln Benefit Co. v. Manglona*, 2014 WL 3608893, at *4 (S.D. Tex. 2014) (Texas ROD statute did not apply to life insurance policy purchased in Guam because policy contained choice-of-law provision designating the applicable law as the jurisdiction in which

further exacerbated by retroactive application, which "only confuses an already dizzying area of law."[75] The contradictory assumptions underlying ROD statutes and the additional legal complexities they create belie the claim that they rationally address a significant and legitimate public purpose. Instead, they show that the statutes represent merely a "[l]egislative perception regarding the more worthy recipient" of non-probate assets.[76] Indeed, ROD statutes may be a remnant of the era when divorce laws required courts to decide which spouse was

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policy application was signed); Pet. at 1, 20, 22, *Lazar v. Kroncke*, No. 17-521, 2017 WL 4512260 (filed Oct. 3, 2017) (ROD statutes "force investment firms and other account custodians to file interpleader actions, raising thorny choice-of-law issues, incurring litigation expenses, freezing funds for extended periods of time, triggering disputes among relatives, and draining account assets . . . instead of disbursing funds to a specific, named individual, the financial institution must find the new beneficiary and navigate potential choice-of-law problems.").

[75] Kristen P. Raymond, Note, *Double Trouble - an Ex-Spouse's Life Insurance Beneficiary Status & State Automatic Revocation Upon Divorce Statutes: Who Gets What?*, 19 Conn. Ins. L.J. 399, 425 (2013) ("[S]tates that choose to adopt the modern minority rule should avoid making them retroactively applicable . . . creating more unsettlement in an already murky area of law.").

[76] *In re Workers' Comp. Fund*, 46 F.3d at 821.

"more worthy" and which was to blame for failure of a marriage.[77]

III. APPLYING REVOCATION-ON-DIVORCE STATUTES RETROACTIVELY IS NOT A REASONABLE OR APPROPRIATE MEANS TO EFFECTUATE A DECEDENT'S INTENT

Even if the Court were to find that Minnesota's ROD statute advances a "significant and legitimate" public purpose, it cannot be upheld unless it is "reasonable" and "necessary" to serve the state's purpose.[78] In other words, the Court must assess "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'"[79] Where, as here, there is no showing that a "severe disruption of contractual expectations was necessary to meet an important general social problem," any "presumption favoring

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[77] *See, e.g.*, Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1810 (1985) ("Before no-fault divorce, the law retained for itself much of the responsibility for the moral choice whether to divorce; after no-fault, most of that responsibility was transferred to the husband and wife.").

[78] *U.S. Tr. Co.*, 431 U.S. at 29.

[79] *Energy Reserves Grp.*, 459 U.S. at 412 (quoting *U.S. Tr. Co.*, 431 U.S. at 22).

'legislative judgment . . . ' cannot stand."[80]

A. Revocation-on-divorce statutes' disparate impact on women make them unreasonable means of advancing the state's purpose

ROD statutes exacerbate the economic insecurity of divorced women, and to the extent they produce any marginal benefit at all, it is far outweighed by the severe damage these statutes can cause.

Petitioners have "not explained why it is reasonable and necessary that the brunt" of individual policyholder's inattentiveness is a problem that must "be borne" by women whose husbands rely on the law as it existed at the time of their contract.[81] Nor have Petitioners explained why it is reasonable to penalize women who chose to marry, while favoring those who structure their intimate relationships differently.

Courts have expressly considered a statute's impact on gender equity in assessing whether retroactive application is reasonable when judged against a state interest. For example, the Illinois

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[80] *Spannaus*, 438 U.S. at 247 (quoting *U.S. Tr. Co.*, 431 U.S. at 23).

[81] *Univ. of Hawaii Prof. Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999).

Supreme Court, in upholding retroactive application of an equiable distribution statute, acknowledged the law could impair a "limited property interest," but found that the statute's purpose—to *promote* gender equality—justified the incursion.[82] The primary objective of the legislature, the court noted, was "to create a system of property division upon dissolution of marriage that is more equitable than that which previously existed in this State."[83] Thus, "[o]n balance," the gender equality "to be promoted by applying the [statute] retrospectively greatly outweigh[ed] the asserted property interest[.]"[84]

The ROD statute at issue here, by contrast, aggravates inequality rather than redressing it.[85] ROD statutes disparately impact divorced women, who are already at a severe structural disadvantage with respect to financial security, especially in retirement. Given the "virtually total" contractual impairment that ROD statutes cause,[86] and the devastating consequences they can inflict on divorced

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[82] *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1386-88 (Ill. 1978).

[83] *Id.* at 1388.

[84] *Id.*

[85] *See supra* Point I.

[86] *Parsonese*, 706 A.2d at 818.

women, the fact that in some cases ROD statutes happen to produce a result that coincides with a decedent's intent does not justify their existence.

B. There are solutions available to states that are far more likely to effectuate a decedent's intent than revocation-on-divorce statutes

To be deemed a valid exercise of the state's police power, Minnesota's ROD statute also must be appropriately tailored to the purpose it was designed to serve.[87] States are "not free to impose a drastic impairment [on contractual obligations] when an evident and more moderate course would serve its purposes equally well."[88]

Minnesota and other states with retroactive ROD statutes have available several alternative approaches that are far less destructive of existing contractual rights and far more likely to effectuate a divorced decedent's intent. For example, as the Pension Rights Center and National Women's Law Center have jointly suggested, states could require the administrators of non-probate assets—*e.g.*, insurance companies or financial institutions—to

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[87] *See, e.g.*, *Energy Reserves Grp.*, 459 U.S. at 412; *Spannaus*, 438 U.S. at 244.

[88] *U.S. Tr. Co.*, 431 U.S. at 31.

provide account holders with notices or new beneficiary designation forms at regular intervals.[89]

Alternatively, states could enact laws or regulations, or by judicial decision require, courts to affirmatively raise the question of beneficiary designations during matrimonial proceedings, and thereby ensure that divorce decrees or settlement agreements deal with the issue.[90] Or states could modify procedural requirements or legal ethics rules to require attorneys in matrimonial proceedings to certify that they have addressed that question with their clients.

The existence of multiple alternative solutions—any of which would far better protect a divorced decedent's intent—establishes that retroactive revocation-on-divorce statutes are neither reasonable nor appropriately tailored to their purported public purpose.

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[89] Pension Rights Ctr. & Nat'l Women's Law Ctr., *Comments to ERISA Advisory Counsel* 5 (2012), https://goo.gl/Fer4XW.

[90] *See* Resp. Br. 31-32 (discussing the approaches of Va. Code Ann. § 20-111.1(E) and Utah Code Ann. § 30-3-5(1)(e)(i)).

CONCLUSION

The Court should invalidate retroactive application of revocation-on-divorce statutes.

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Respectfully submitted,

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APPENDIX

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STATEMENTS OF INTEREST

The Women's Law Project

The Women's Law Project (WLP), founded in 1974, is a nonprofit legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of women throughout their lives. To advance these goals, WLP engages in high impact litigation, policy advocacy, public education, and individual counseling. Economic justice and equality for women are high priorities for WLP, including efforts to eliminate workplace inequality which contributes to the economic hardship and poverty disparately impacting women later in life, particularly women of color. WLP has represented clients challenging sex discrimination in the workplace and advocated for legal reform to achieve equity in the workplace and in retirement.

American Association of University Women

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning 27 college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university

partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, chief among them financial gender equality. In adherence with its member-adopted Public Policy Program, AAUW is a staunch advocate for pay equity and offers programming designed to increase financial security for women. AAUW promotes research and advocacy initiatives that highlight the burdensome impact that financial insecurity, due to debt, the wage gap and other societal factors, can have over women's lifetimes.

Atlanta Women for Equality

Atlanta Women for Equality is a nonprofit organization dedicated to providing free legal advocacy to women and girls facing sex discrimination in the workplace or school, expanding economic and educational opportunities for women and girls, and helping our community build employment and educational environments according to true standards of equal treatment. Our central goal is to use the law to overcome the oppressive power differentials and economic disparities imposed by socially predetermined gender roles and persistent discrimination.

A Better Balance

A Better Balance is a non-profit legal advocacy organization working nationally to promote fairness, equality, and justice in the workplace for women and

families. A Better Balance helps employees meet the conflicting demands of work and family through policy advocacy, outreach, and direct legal services. As part of its core mission, A Better Balance leverages the power of the law to ensure that no worker has to make the impossible choice between their job and their family. We are leading advocates for policies that combat discrimination based on family status, caregiving responsibilities, and pregnancy, and policies that help support families, including paid sick leave and family leave, flexible work, and pay equity.

California Women's Law Center

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on addressing the economic security of women with a specific focus on aging women.

Feminist Majority Foundation

Founded in 1987, the Feminist Majority Foundation (FMF) is a national organization dedicated to women's equality, reproductive health, and the empowerment of women and girls in all sectors of society. FMF engages in research and public policy development, public education programs, grassroots organizing projects, and

leadership training and development programs. Through its work, FMF seeks to end sex discrimination and advance the legal, social, economic, and political equality of women, people of color, and LGBTQ individuals. FMF is a strong advocate for economic justice for women at all stages of their lives.

Gender Justice

Gender Justice is a non-profit legal advocacy organization based in the Midwest that works to eliminate gender barriers through impact litigation, policy advocacy, and education. Gender Justice helps courts, employers, schools, and the public better understand the root causes of gender discrimination, including with respect to economic equality and security. Gender Justice serves as counsel to women denied equal pay in the workplace and participates as amicus curiae in state and federal cases relating to economic justice that have an impact in the region.

Legal Momentum

Legal Momentum, established in 1970, is the nation's oldest 501(c)(3) organization dedicated to advancing the rights of all women and girls (http://www.legalmomentum.org/). Legal Momentum's mission is to ensure economic and personal security for all women and girls by advancing equity in education, the workplace, and the courts. Legal Momentum's targeted litigation,

education, policy advocacy, and research help to shape laws and policies that promote gender equity and ensure that these laws are properly implemented and enforced. Legal Momentum has long been concerned with women's economic security post-divorce, litigating, for example, to establish the equitable distribution of marital property at divorce. Through Legal Momentum's National Judicial Education Program (NJEP) Legal Momentum has provided judicial education about the economic value of homemaker work, the difficulties faced by long time homemakers entering the paid labor force and how judges' inadequate and unenforced alimony and child support awards have forced formerly economically secure women and their children onto public assistance.

Legal Voice

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, and education. Since its founding in 1978, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice is a leading regional expert on issues of gender equality in wages, employment, and benefits. Additionally, Legal Voice has been a strong advocate for ensuring and maintaining the protections for economic gender equality.

National Partnership for Women & Families

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that promotes fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has fought to combat sex discrimination and has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities. Since its founding in 1972, the Center has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. As part of this work, NWLC fights for the economic security of older women, who, on average, live longer, have less income, and are more likely to be impoverished, than men. The Center has

participated as counsel or *amicus curiae* in a range of cases before this Court.

Pension Rights Center

Founded in 1976, the Pension Rights Center is a Washington D.C.-based, national nonprofit organization committed to protecting and promoting the retirement security of employees, retirees, and their families. Advocacy by the Center's Women's Pension Project played a critical role in the enactment of federal laws protecting the retirement rights of divorced women. Educational materials published by the Center provide helpful information about the division of retirement benefits at divorce. In addition, the Center provides legal advice to individuals going through divorce both directly and as a technical resource center for federally-funded regional pension counseling projects. Resolution of the issue presented by this case will directly impact the financial security of Center clients and countless other women throughout the nation.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit policy and advocacy law center that was organized in 2005 to advance opportunities for women and girls in New Mexico. It collaborates with community members, organizations, attorneys, and public officials to address economic outcomes for women and their families. It advocates for equal

rights for women who are the heads of households, and helps ensure that all individuals are treated with respect regardless of sex or gender.

Women's Institute for a Secure Retirement

The Women's Institute for a Secure Retirement (WISER) is dedicated to education and advocacy that will improve the long-term financial quality of life for women. As the only nonprofit organization to focus exclusively on the unique financial challenges that women face in retirement, WISER seeks to improve women's opportunities to secure fair pensions and adequate retirement income through research, workshops, partnerships, education materials, and outreach with lawmakers and the media. WISER operates the National Resource Center on Women and Retirement Planning, a comprehensive compendium of educational and informational materials that are used by a variety of audiences to help educate women about the need to prepare for, save for, and overcome barriers to secure income in retirement.